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**Limits on state autonomy in regulating services trade  
regional and international trade liberalization commitments and public morals**

Akcali Gur, Berna

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**Author:** BERNA AKÇALI GÜR

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**LIMITS ON STATE AUTONOMY IN  
REGULATING SERVICES TRADE:  
REGIONAL AND INTERNATIONAL TRADE  
LIBERALIZATION COMMITMENTS AND  
PUBLIC MORALS**

**BERNA AKÇALI GÜR**

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LAW**

**PHD DEGREE**

## **Abstract**

This thesis explores the scope of the autonomy of the states in regulating services trade in areas that concern their public morals and analyses whether the indeterminacy of the public morals exceptions in supranational trade regimes reveals fundamental flaws in the design of those regimes as they apply to trade in services with reference to their experiences with cross-border provision of online gambling services.

This interplay and tension between the scope of autonomous areas of the states and organizations since World War II has received considerable scholarly attention. Most of the academic discourse consists of supporting claims for and critical analysis of the constitutionalisation of the supranational legal order and the goals of supranational constitutionalism which typically aim for universality of rules and coherence. The persistent diversity of public morals at the national level is among those national circumstances often perceived as a threat to the constitutionalisation project and thought of as discrediting the achievability of the constitutionalist ideal. On the other hand, proponents of legal pluralism often emphasize the importance of preserving public morals.

This thesis finds that, in both the WTO and EU context even if national laws regarding public morals are incoherently pluralistic, it may be possible for supranational regimes to bridge the structural divide between international laws and national laws effectively by developing doctrinal rules and practices that enable them. The analysis based on the online gambling example shows that both organizations have been able to accommodate these divergences without undermining their treaty objectives, mostly owing to their effective judicial review mechanisms which are complemented by, more in the case of EU, other conflict resolution mechanisms including dialogue and negotiation. Within this framework, this credits constitutional pluralism perspective as the appropriate choice both for descriptive and normative purposes.

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## Abbreviations

AFAS	ASEAN Framework Agreement on Services
ASEAN	Association of Southeast Asian Nations
DOJ	United States Department of Justice
DR-CAFTA	United States–Dominican Republic–Central America Free Trade Agreement
EC	European Communities
ECJ	European Court of Justice
EFTA	European Free Trade Area
EEA	European Economic Area
EP	European Parliament
EU	European Union
ESA	EFTA Surveillance Authority
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GGR	Gross Gaming Revenue
ICT	Information Communication Technologies
IGBA	Illegal Gambling Business Act
IHA	Interstate Horseracing Act
MERCOSUR	The Mercado Commun del Sur (Common Market of the South)
MFN	Most Favoured Nation Treatment
NAFTA	The North American Free Trade Agreement
OECD	Organization for Economic Co-operation and Development
RICO	Racketeer Influenced and Corrupt Organizations Act
SICL	Swiss Institute of Comparative Law
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UIGEA	Unlawful Internet Gambling Enforcement Act
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
US or USA	United States of America
WTO	World Trade Organization



## Table of Cases

<b>Jurisdiction</b>	
<b>USA</b>	<i>In re Allen</i> , 377 P.2d 280 (Cal. 1962)
	<i>In re: Mastercard International Inc. Internet Gambling Litigation</i> , 313 F.3d 257 (2002)
	<i>Casino City, Inc v. U.S. Department of Justice</i> , Civil Action No. 04-557-B-M3, (M.D. La. 2004).
	<i>Sanchez Llamas v Oregon</i> 548 U.S. 331 (2006)
	<i>Medellin v Texas</i> 552 U.S. 491 (2008)
	<i>USA v. Lawrence Dicristina</i> , 11-CR-414, NYLJ 1202568480608, at *1 (EDNY, Decided August 21, 2012)
<b>WTO</b>	<i>Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R (Appellate Body Report, 11 December 2000)
	<i>EC - Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R (Appellate Body Report, 12 March 2001)
	<i>US - Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/RW (Appellate Body Report, 22 October 2001)
	<i>US - Measures Affecting Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R (Panel Report, 10 November 2004)
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	<i>China - Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R (Panel Report, 12 August 2009)

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	<i>EC - Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R (Appellate Body Report, 12 March 2001)
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<b>NAFTA</b>	<i>Int'l Thunderbird Gaming Corp. v. United Mexican States</i> , UNCITRAL, Arbitral Award (Jan. 26, 2006)
<b>EU</b>	<i>NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen</i> (Case 26/62) [1963] ECR I-1
	<i>Flaminio Costa v. ENEL</i> (Case 6/64) [1964] ECR I-585
	<i>Commission v Italy</i> (Case 7/68) [1968] ECR I-423
	<i>Procureur du Roi v Benoît and Gustave Dassonville</i> (Case C-8/74) [1974] ECR I-00837
	<i>Regina v Maurice Donald Henn and John Frederick Ernest Darby</i> (Case C-34/70) [1979] ECR I-3795

	<i>Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*</i> (Case C-120/78) [1979] ECR I-649
	<i>Conegate Limited v HM Customs &amp; Excise</i> (Case C-121/85) [1986] ECR I-1007
	<i>The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others</i> (Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division-UK-Fisheries-Registration of vessels–Conditions) (Case C-221/89) [1991] ECR I-03905
	<i>Manfred Säger v Dennemeyer &amp; Co. Ltd.</i> , (Case C-76/90) [1991] ECR I-4221
	<i>Her Majesty's Customs and Excise v Gerhart Schindler and Jörg Schindler</i> (Case C-275/92) [1994] ECR I-1039
	<i>Markku Juhani Läärrä, Cotswold Microsystems Ltd and Oy Transatlantic Software Ltd v Kihlakunnansyyttäjä (Jyväskylä) and Suomen valtio (Finnish State)</i> (Case C-124/97) [1999] ECR I-6067
	<i>Questore di Verona and Diego Zenatti</i> (Case C-67/98) [1999] ECR I-7289
	<i>Associação Nacional de Operadores de Máquinas Recreativas (Anomar) and Others v Estado português</i> (Case C-6/01) [2003] ECR I-08621
	<i>Criminal proceedings against Piergiorgio Gambelli and Others</i> (Case C-243/01) [2003] ECR I-13031
	<i>Diana Elisabeth Lindman</i> (Case C-42/02) [2003] ECR I-13519
	<i>Commission v. Greece</i> (Case C-65/05) [2006] ECR I-10341
	<i>Rosengren and Others v Riksåklagaren</i> (Case C-170/4) [2007] ECR I-04071
	<i>Criminal Proceedings against Massimiliano Placanica and Others</i> (Joined Cases C-338/04, C-359/04 and C-360/04)[2007] ECR I-1891

	<i>Commission of the European Communities v. Italian Republic</i> (Case C-260/04) [2007] ECR-I 07083
	<i>Liga Portuguesa de Futebol Profissional and Bwin International Ltd., formerly Baw International Ltd. v. Departamento de Jogos de Santa Casa da Misericórdia de Lisboa</i> (Case C-42/07) [2009] ECR I-7633
	<i>Commission of the European Communities v. Kingdom of Spain</i> (Case C-153/08) [2009] ECR I-09735
	<i>Ladbrokes Betting and Gaming Ltd., Ladbrokes International Ltd. v. Stichting de Nationale Sporttotalisator</i> (Case C-258/08) [2010] ECR I-04757
	<i>Sporting Exchange Ltd, trading as Betfair v. Minister van Justitie, intervening party Stichting de Nationale Sporttotalisator</i> (Case C-203/08) [2010] ECR I-04695
	<i>Criminal Proceedings against Otto Sjöberg and Anders Gerdin</i> (Joined Cases C-447/08 and C-448/08) [2010] ECR I-06917
	Joined Cases C-402/05P and C-415/05P, <i>Kadi and Al Barakaat</i> , Judgement of the Court of 3 September 2008
	<i>Winner Wetten GmbH v Bürgermeisterin der Stadt Bergheim</i> (Case C-409/06) [2010] ECR I-8015
	<i>Carmen Media Group Ltd v Land Schleswig-Holstein, Innenminister des Landes Schleswig-Holstein</i> (Case C-46/08) [2010] ECR I-0000
	<i>Markus Stoß, Avalon Service-Online-Dienste GmbH and Olaf Amadeus Wilhelm Happel v Wetteraukreis, and Kulpa Automaten Service Asperg GmbH, SOBO Sport &amp; Entertainment GmbH and Andreas Kunert v Land Baden-Württemberg</i> (Joined cases C-316/07, C-358/07, C-359/07, C-360/07, C-409/07 and C-410/07) [2010] ECR I-0000
	<i>Criminal proceedings against Ernst Engelmann</i> (Case C-64/08) [2010] ECR I-0000

	<i>Zeturf Ltd. v Premier Ministre</i> (Case C-212/08) [2011] ECR I-0000
	<i>Criminal proceedings against Jochen Dickinger and Franz Ömer</i> (Case C-347/09) [2011] ECR I-0000
	<i>Criminal proceedings against Marcello Costa and Ugo Cifone</i> (Joined Cases C-72/10 and C-77/10) [2012] ECR I-0000
	<i>Hit and Hit Larix v Bundesminister für Finanzen</i> (Case C-176/11) ECR [2012] I-0000
	<i>SIA Garkalns v Rīgas dome</i> (Case C-470/11) [2012] ECR I-0000
<b>EFTA</b>	<i>EFTA Surveillance Authority v. The Kingdom of Norway</i> (Case E-1/06) [2007] EFTA Ct. Rep. 72 paragraph 8
	<i>Ladbroke's Ltd. v. The Government of Norway, Ministry of Culture and Church Affairs, The Government of Norway, Ministry of Agriculture and Food</i> (Case E-3/06) [2007] EFTA Ct. Rep. 49

\*Also referred to as “Cassis de Dijon”.

## Table of Legislation

<b>Antigua &amp; Barbuda</b>	Interactive Gaming and Interactive Wagering Regulations
<b>Canada</b>	Gaming Control Act, [SBC 2002], Chapter 14, Part I, Art 1
<b>EEA</b>	<b>Agreement on the European Economic Area</b> Art 31(1) Art 36(1)
<b>EU</b>	<b>Directives</b> Electronic Commerce Directive 2000/31/EC, 17 Jul 2000 Preamble, Paragraph 16 Art 1 Services in the internal market (Services) Directive 2006/123/EC, 27 Art 2(2)h Art 34 Audio-Visual Media Services Directive 2007/65/EC, 18 Dec 2007 Preamble, Paragraph 22
	<b>Treaties</b> Charter of Fundamental Rights of the European Union 2000 EC Art 43 Art 49 Art 50 Lisbon Treaty TEU Art 5(2) Art 5(3) TFEU Art 3 Art 4 Art 34

	Art 36
	Art 49
	Art 52
	Art 54
	Art 56
	Art 57-62
<b>Greece</b>	Law No 3037/ 2002
<b>International</b>	ASEAN Framework Agreement on Services
	Art XIV(1)
	Montevideo Protocol On Trade in Services of MERCOSUR
	Art XIII(a)
	North American Free Trade Agreement
	Chapter XI
	UNESCO Universal Declaration on Cultural Diversity
	Art 8
	Universal Declaration of Human Rights
	Art 19
	Vienna Convention on the Law of Treaties
	Art 31
	Art 32
<b>USA</b>	<b>Federal Laws</b>
	U.S. Constitution
	Art 1, Section 8, Clause 3
	Interstate Horseracing Act, 15 USC §§3001-3007
	Illegal Gambling Business Act, 18 USC §1955 (b)(2)
	Racketeer Influenced and Corrupt Organizations Act, 18 USC §
	Travel Act, 18 USC §1952
	Security and Accountability For Every Port Act of 2006, 6 USC
	Unlawful Internet Gambling Enforcement Act, 31 USC §5361–5367
	§101

	Wire Act of 1961, 18 USC §1081
	Paragraph 5
	Professional and Amateur Sports Protection Act of 1992, 28 USC
	<b>State Laws</b>
	Colorado Revised Statutes
	§ 18-10-103
	Louisiana Revised Statutes, Annotated
	§ 14:90.3
	Massachusetts Statute, Annotated
	§ 17A of chapter 271
	Minnesota Statute, Annotated §§ 609.75,
	Subdivisions 2 – 3 and 609.755(1)
	New Jersey State Constitution
	Paragraph 2
	New Jersey Code
	Art 4, §VII and §2A:40-1
	South Dakota Codified Laws
	§§22-25A-1 - 22-25A-15
	New York State Constitution
	Art I, §9
	New York General Obligation Law
	§5-401
	Utah Code Annotated
	§76-10-1102
<b>UK</b>	Gambling Act 2005
	Art 6
	Art 10
<b>WTO</b>	General Agreement on Tariffs and Trade (GATT) 1994
	Art XX(a)
	General Agreement on Trade in Services (GATS) 1994



	Preamble
	Art I(2), (2)(a), (3)(b)
	Art II (1)
	Art VI (1) and (3)
	Art VIII
	Art XI (1)
	Art XII
	Art XIV(a), (b), (c)
	Art XIV(c)(i), (c)(ii)
	Art XVI
	Art XVI(1), (2)(a)(c)
	Art XVII (1), (2) and (3)
	Art XVIII
	Art XX(I)
	Art XXI(2)(a), (3)(a)

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## 1. Introduction

Farmville, Cady Crush Saga, Pet Rescue Saga and a list of other social games have all become household names around the globe, in the last six years. In 2013 roughly 11% of the world's population that is more than 750 million people are estimated to play them every month<sup>1</sup>. Participation in these games is typically free of charge, there is no monetary pay out and they are commonly referred to as social games characterised by the social network platforms they have been offered at, such as facebook and google+<sup>2</sup>. Soon after their appearance in 2007, games that are traditionally played to gamble, primarily poker and casino games took their place among them and they have reached 173 million users per month.<sup>3</sup> As of September 2013, no laws or regulations had been enacted that refer specifically to social gaming neither in the EU nor in the US (Günter Schmid et al., 2013: 90)<sup>4</sup>. They are simply available for anyone who has access to a digital distribution network<sup>5</sup>.

While the national authorities remain undecided as to whether any sector specific regulatory oversight is necessary, this industry has reached extensive number of participants across seven continents and even expanded to mobile platform via mobile specific applications (Krafcik, 2013).<sup>6</sup> The reluctance of regulators to act brings the experience with online gambling to mind. In 1994, the forerunners of online gambling companies emerged and the online gambling market quickly reached an extensive size<sup>7</sup>. It became a global industry

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<sup>1</sup> Please see Online Games Presentation at 15 May 2013 meeting of Pennsylvania Gaming Control.

<sup>2</sup> There are a number of definitions. According to Casual Games Sector Report of 2012 by Casual Games Association, social network games are “games that run on a social network, require player to be online, run embedded in the social networks pages and use social features as deeply integrated gameplay elements”. In their recent work, Schmid, Talos and Aquilina lifted the platform restriction embedded in this definition and developed a more comprehensive one to include other digital communication platforms that social games have started to be offered at. According to this a social game is “a game with symbolic rewards and freemium access via an established distribution network account that requires the players permission and use of player links to a social graph for promotion, retention and game play” (Günter Schmid et al., 2013: 30).

<sup>3</sup> Please see ‘Social Gaming: Click Here to Play’ (2012) Morgan Stanley Research

<sup>4</sup> In the EU, both at union level and at national levels, there are directives and regulations that have been enacted to regulate information society services in general, which are also applicable to social games. Among them are: E-Commerce Directive, Consumer Rights Directive. (Günter Schmid et al., 2013, pg.95 and 99). Also, some national gambling regulators, such as French ARJEL, are considering passing sector specific regulations while in the US no news of this sort have appeared so far. Please see GELLATLY, A. 2012. Europe, US At Different Speeds On Social Gaming Regulation Gambling Compliance [Online]. Available: <http://www.gamblingcompliance.com/node/50212> [Accessed 24 September 2013].

<sup>5</sup> As mentioned above, social games are no longer exclusively offered at social network sites (Günter Schmid et al., 2013: 30).

<sup>6</sup> Please see Social Gaming White Paper by GamblingData (2012) Available at: <http://www.gamblingdata.com/files/SocialgamingDataReportOct2012.pdf>.

<sup>7</sup> Although the market value of social gambling (1.7 billion US Dollars in 2012) is not very high compared to the market value of online gambling (35 billion US Dollars for 2012); the 173 million social gamblers per

before the state authorities realized it was necessary to establish national control mechanisms due to moral, economic and customer protection related concerns. The delayed attempts of states to implement protective measures were further delayed by international confrontations among competing public and private interests both at national and supranational<sup>8</sup> levels. The changing process of gambling regulations was still ongoing while the social gaming phenomena emerged and spread. The two markets are related as the social games are generally permissible to the extent that they do not classify as games of chance or gambling (Günter Schmid et al., 2013: 111).<sup>9</sup> Should the national regulators decide that social gaming also requires sector specific regulations and national control mechanisms, even if they do not classify as a gambling activity, we are very likely to witness another high scale international controversy.

The social games market is one of the last examples of a services sector that took advantage of the ease and breadth of digital commutation platforms, mainly the Internet and mobile networks, to reach consumers across borders. This extraordinary opportunity that became available with technological advancements has challenged long established state controls over cross-border services trade. Previously, the online gambling experience showed that regulatory mechanisms of states are typically too slow to realize the consequences of the fast paced technological changes and respond timely to them. In addition, while the concerns surrounding services sectors are mostly particular to each nation with political and economic consequences, such as customer protection, taxation, public order and public morals, the solutions require consideration of cross-border character of the transactions and hence states' supranational commitments and limitations arising from the same. Consequently, the

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month raise hopes for high potential for value growth, when compared to 50million real-money gamblers. Please see Social Gaming: Click Here to Play' (2012) Morgan Stanley Research

<sup>8</sup> Within this thesis the World Trade Organization ("WTO") and the European Union ("EU") and their bodies are referred to as supranational entities in order to emphasize their supranational aspects, with reference to the definition provided by Amitai Etzioni. He had defined three elements, each of which can denote supranationality to an organization which are: "(1) Decision making power on significant issues by a body that is not composed of national representatives (even if they are appointed by member nations they do not act under their instruction), that does not receive instructions from national governments and that follows its own rules, policies and values. (2) Not only the member states but also their citizens and other legal entities (such as corporations and labor unions) are legally obliged to comply with the decisions of the body without the need for a separate decision by national governments. (3) Some sort of direct enforcement power on individuals or other private parties.(Etzioni, 2001: xix) In this framework the some aspects of WTO and its dispute resolution body possesses the second element. The EU Institutions and bodies posses at least one and in some cases three of these elements.

<sup>9</sup> In social games, typically, there is no monetary prize and in most cases no consideration to participate in the game. In the absence of either of the two, an activity is not considered gambling and escaped the strict control mechanisms. For further information on the issue please see Section 2.2.

supranational treaties and structures that aim for universal applicability become relevant in their capacity to guide cross-border aspects of the problems. The obligation to consider such commitments in relation to issues that are seemingly of particular to local circumstances have been prone to cause tension among the national and supranational interests in relation to the limits that can be imposed by the latter on the regulatory authority of the former.

The complexities of the multifaceted, multiparty issues arising from cross-border services trade via digital communication platforms have received scholarly attention from most branches of social sciences if not all, including economics, sociology, politics, public policy and law<sup>10</sup>. Among them, for an analysis that is conducted via an international law perspective, the scope of nations' autonomous areas and the extent of their right to regulate them with respect to their international commitments are the initial issues if not the key issues that need to be addressed.

### **1.1. Literature Review and the Resulting Research Question**

The concept of national sovereignty and consequently the scope of autonomous areas of a nation have been changing significantly since the end of World War II. International organizations such the United Nations (UN) in the human rights area and the WTO, later, in the trade area have been instrumental in facilitating this change. Their founding treaties have been largely formulated by states that frequently advocate liberal economic and political principles. These treaties mostly relate to the multilateral relationships among their member states and to a lesser extent their traditionally autonomous areas. These rights of involvement in sovereign areas, as granted by each organization's founding treaties to pursue the objectives sought via their establishment, were novel and indeed unfamiliar to the prior understandings of sovereignty (Etzioni, 2001: xix) which have been primarily based on territoriality and the autonomy of states in controlling their domestic matters (Walker, 2003a). That is why sovereignty is often conceived of as being subjected to or even threatened by limitations due to increasing level and number of types of international commitments which often aim for universality (Cowles and Dinan, 2004: 66-67).

On the other side of the coin, from an international law perspective sovereignty concept<sup>11</sup> also has negative connotations (Roth, 2011:3). This is because sovereignty argument has

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<sup>10</sup> A search for "Internet services" returned 2.900.000 results, "mobile services" returned 3.200.000 results, "Internet services international law" returned 1.230.000 results on googlescholar.com on 27 September 2013.

<sup>11</sup> It is often referred to as Westphalian Sovereignty because this concept is commonly thought to be originated in 1648 in the Peace of Westphalia to end the wars among European nations.

often been raised in situations in which states are challenging decisions that they believe to be an illegitimate intrusion into their autonomous areas. Indeed, the limits of national autonomy are not always clear and the process through which it is defined with reference to primary treaty obligations and permitted exceptions and derogations is ongoing and is often deemed problematic (Keller, 2011:81). Thus it is not an easy task for supranational organizations and especially their judicial organs to exercise powers bestowed upon them under the shadow of the “sovereignty argument”, whereas each new challenge is also a milestone in reassuring the scope of their powers and their competence (Sarooshi, 2007).

### *Public Morals and National Sovereignty*

The preservation of state autonomy in regulating areas that relate to member nations’ public morals areas, which are often particular to each nation, is one of those topics that has been specifically addressed in most multilateral trade treaties since 1923<sup>12</sup>. However, until the *US-Gambling* dispute (“*US-Gambling*”) in 2003, these provisions were not invoked in a dispute. Hence they mostly remained dormant, their application and their implications on the limits of autonomous areas of states remained uncertain. Seemingly insignificant for a period, this topic was largely ignored by scholars<sup>13</sup>. Starting with *US-Gambling*, the tensions between expansionist goals of trade liberalization obligations and member state struggles to preserve autonomy over matters they deemed to fall within their sphere of public morals came to surface. Since then this topic has been evaluated in numerous publications<sup>14</sup>.

Within the EU, this tension had become evident earlier in a number of disputes regarding the free movement of goods.<sup>15</sup> This initial case law concerned the importation of obscene

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<sup>12</sup> Protocol on International Convention Relating to the Simplification of Customs Formalities, 3 November 1923, 30 L.N.T.S. 373. Steve Charnovitz conducted an extensive research on earlier trade agreements and found that this protocol was the first example for a multilateral treaty to contain public morals exception and that after 1927 it became an established practice (1998). For regional agreements please see Section 4.7. Also public morals exceptions in GATS and TFEU are analysed in further detail in Chapters 4 and 5.

<sup>13</sup> One of the rare pieces that pointed out to the importance of public morals exception in international trade was by Christoph T. Feddersen in 1998. Please see: “Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT’s Article XX(a) and “Conventional” Rules of Interpretation (Feddersen, 1998).

<sup>14</sup> Including but not limited to: The Moral Exception in Trade Policy (Charnovitz, 1998), Protecting Public Morals in a Digital Age (Delimatsis, 2010), Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine (Wu, 2008), The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole (Diebold, 2008), King & Kishani “Choosing between Liberalization and Regulatory Autonomy under GATS: Implications of U.S.-Gambling for Trade in Cross Border E-Services” (King, 2007), Trade and morality: The WTO public morals exception after gambling (Marwell, 2006), The Internet, cross-border trade in services, and the GATS: lessons from US-Gambling (Wunsch-Vincent, 2006), National Regulation and Trade Liberalization in Services (Krajewski, 2003).

<sup>15</sup> Some examples are: *Henn and Darby* (C-34/79, *Henn and Darby* [1979] ECJ I-03795) was the ECJ’s first ruling related to public morals, in the context of restrictions on importation of pornographic materials, namely

material and of indecent or obscene films and magazines<sup>16</sup>. Nonetheless, the public morals exception and the EU Member States' commitment to free movement of services became high profile only after a series of gambling related lawsuits were brought to the ECJ.<sup>17</sup> The ECJ rulings and other EU institutions' administrative decisions<sup>18</sup> showed that, even in this most integrated model of the supranational system, preservation of the right to regulate public morals areas has been considered a feature of state autonomy. In 2012, the ECJ's last ruling in a gambling case confirms that this stance has not changed:

...the legislation on betting and gaming is one of the areas in which there are significant moral, religious and cultural differences between the Member States. In the absence of harmonisation, it is for each Member State to determine in those areas, in accordance with its own scale of values, what is required in order to ensure that the interests in question are protected.<sup>19</sup>

The repeated acknowledgement of the diversity of EU member states and their right to regulate public morals areas reveal one of the limitations of the supranational powers of the EU and, in turn, the remaining sovereign areas of the EU member states. This is a significant contribution to the ongoing sovereignty debate within the EU.<sup>20</sup>

The same can be said of the WTO as the judicial organs, DSB and Appellate Body adopted a similar position.

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films and magazines. In *Conagate* (C-121/85, *Conagate* [1986] ECJ I-01007) the UK could not successfully invoke the public morals exception although the dispute concerned importation of sexual or obscene articles (inflatable dolls that are clearly of a sexual nature and other erotic articles). The reason was that very similar products were manufactured and marketed in the UK.

<sup>16</sup> Also referred to in *Prohibition of Obscene Imports in the United Kingdom - A Violation of Article 36 of the Treaty Establishing the European Community* (McClister, 1994-1995), *Restrictive Import Regulations on Pornography: Public Morality of Protectionism* (Post, 1992), *The Substantive Law of the EU* (Barnard, 2010: 150-151).

<sup>17</sup> *Religion and the Public Order of the European Union* (McCrea, 2010), *Has the ECJ's Jurisprudence in the Field of Gambling Become More Restrictive When Applying the Proportionality Principle* (Littler, 2007), *Closing Remarks* (Geeroms, 2007), *Public Policy and General Interest exceptions in the jurisprudence of the European Court of Justice: Towards a European conception of values and rights?* (Kelly, 1996), *Discrimination and Free Movement in EC Law* (Bernard, 1996),

<sup>18</sup> For a detailed account please see Sections 5.4. and 5.5.

<sup>19</sup> Please see paragraph 36 of Case C-470/11, *SIA Garkalns v Rīgas dome* [2012] ECJ I-0000, Judgment of the Court (Fourth Chamber) of 19 July 2012. Please see also paragraph 57 of Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-7633.

<sup>20</sup> For a broad coverage of the recent discussions in relation to this topic please see the *Articles in Sovereignty in Transition* edited by Neil Walker (2003b). Some other helpful articles are *The Concept of Sovereignty Revisited* by Jens Bartelson (2006), *State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?* By Ernst-Ulrich Petersmann (2006), *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* by Brad Roth (2011) and many others.

This consensus shows that universalization of public morals by supranational trade organizations is still practically improbable and arguably illegitimate under the current understandings of state sovereignty. Although “there is no evidence that the preservation of a society requires the enforcement of its morality “as such” (Hart, 1963: 82-3).

However, employment of effective control mechanisms by supranational organizations and their judicial organs to decide what legitimately constitutes a public morals matter to the asserting member is of essence to avoid exploitation of this provision via arbitrary use due to indeterminacy of the meaning of public morals concept. As the content and definition of ‘public morals’ is likely to be particular to each nation this is not a straight forward task. Besides, the arbitrary use of the related exceptions provisions has the potential to serve illegitimate protectionist goals by avoiding compliance with supranational obligations. In which case the establishment purposes of the supranational organizations, such as progress towards trade liberalization, will be undermined (Marwell, 2006). The puzzle is not an easy one to solve, because a narrow interpretation of the public moral concept is also equally undesirable. Doing so will not only bring arguably obligations that are in contradiction with public morals of member states but it will also be a disregard for their still autonomous areas and therefore their sovereignty (Feddersen, 1998). The treaty objectives have to be protected and their role as a part of global trade liberalization scheme should not be undermined. Nevertheless, universalization of public morals for liberalization of trade purposes is still illegitimate so their particularity to each nation and the national right to regulate areas of concern has to be respected as well.

### *Digital Media Platforms and Public Morals*

That the appearance of first public morals-related disputes on the international platform coincided with the rise of services provided via the Internet is not a simple coincidence (Delimatsis, 2010). Traditionally, most services<sup>21</sup> sectors have not been subject to international trade, and have been regulated, controlled and in some cases provided primarily by the states themselves.

The enactment of GATS was the first step in liberalizing this sector in 1995, shortly after the digital communication platforms provided many different possibilities for supplying goods and services and enabled a sudden inflow of foreign services supply across borders,

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<sup>21</sup> Some service sectors that are components of merchandise trade, such as international finance and maritime transport, were open to international trade before GATS.



circumventing long established control mechanisms of states. The higher volume and wider scope of services that suddenly became available across borders via digital communication platforms caught states unprepared. This increase in volume, speed and diversity of transactions increased states' justification and practical reasons to regulate them (Goldsmith, 2003: 60). States, then, turned to the technological and legal mechanisms available to them to protect the areas they had sought to preserve under their autonomous control. If these services were originating from their trade partners, the exceptions clauses protecting public morals and public order became the foundation of their legal justification, to escape their trade liberalization commitments.

These novel developments led to broad range of complex legal problems, from treaty interpretation methods to regulatory techniques. Among them this dissertation focuses on the ones that are connected to the special link between protection of public morals and national autonomy and the competing authority claims of national authorities and supranational trade organizations over matters related to public morals. The specific query is whether the indeterminacy of the public morals exceptions in supranational trade regimes reveals fundamental flaws in the design of those regimes as they apply to trade in services?

Conversely, even if national laws regarding public morals are incoherently pluralistic, have the supranational regimes developed doctrinal rules and practices that enable them to bridge the structural divide between international laws and national laws effectively? Noticeably, the questions presented herein are primarily of international law and relate to the interplay between the practical problems of regulating public morals areas in a globalized world and the theoretical debate about the nature and future of supranational regimes. The analysis will contribute to exiting literature by bringing a perspective that has practical and theoretical value and it will guide the relationship between nation states and the supranational organizations and their powers.

## **1.2.The Unit of Analysis:**

In order to answer this research question through empirical analysis, a present day social phenomenon that presents not only a suitable example but rich data was vital. The target topic of services trade had to be a fertile discourse that had been abounded with struggles, conflicts, confrontations and so forth. Moreover the discourse had to comprise a moral dimension where the limits of each agent could be tested. It is within this framework that the supranational legal issues surrounding the cross-border provision of Internet gambling

provide useful data in analyzing the tension between the competing values of trade liberalization and right to regulate autonomous areas.

The analysis is primarily exemplified by the gambling related dispute among Antigua Barbuda and the US as members of the World Trade Organisation (WTO) and the judicial and administrative developments in European Union (EU). This jurisdictional limitation does not reduce the strength of the research for a few reasons. First, the examination of both jurisdictions provides nearly comprehensive coverage of Internet gambling-related case law at the supranational and international levels. Second, differences between the two that arise mainly due to the higher integration level of the EU provide a chance to observe the interplay between state sovereignty and free trade commitments in two distinct supranational settings. Third, the similarity of the basic foundations of the free trade commitments of the member states of each enhances the analysis by providing adequate common ground for a comparative approach, where such is needed.

As mentioned in the previous section, in recent years, mainly as the result of rapid technological advances in digital communication platforms, particularly after the advent of the Internet, services have become increasingly tradable across borders. The fast emerging Internet gambling industry has been just one of the sectors taking advantage of this development, which enabled the industry to access consumers in states that have otherwise maintained exclusively national gambling industries under strict licensing regimes. This was an exceptional opportunity for them to circumvent strict legislative systems which had been adopted to protect public morals, maintain public order and generate additional public funds. As the US and EU states sought to protect their particular interests by obstructing the cross-border provision of these gambling services, they found that they had to justify their measures before supranational dispute resolution bodies within the framework of exceptions and derogations clauses of the trade liberalization treaties they had signed. These confrontations marked the beginning of the supranational judicial process which brought increased media and public attention to the problem.

The recourse to rules governing public morals in order to maintain or re-establish autonomous state control against uncontrollable expansion of Internet gambling services provision via digital communication platforms was not an unexpected reaction. Even before their emergence, the liberalization of the services sectors has been specifically susceptible to interpretation as intervention in state matters and deemed unsuitable for international trade

for a long time on the basis that domestic control seemed indispensable for public policy reasons, including public morals matters. Gambling is clearly an example of these kinds of services, the national control of which was highly associated with the preservation of public order and the protection of public morals, all of which are deemed to be regulated according to particular needs of each nation.

Despite general agreement on the moral aspect of gambling<sup>22</sup>, the interpretation of the application of exceptions and derogations clauses was not straight forward. The supranational judiciaries had to assume the challenging task of implementing and applying effective review procedures to avoid the exploitation of these clauses in order to protect primary treaty objectives while respecting member states' right to regulate their autonomous areas. The successful execution of this task has been revealing about their powers and place in the supranational legal system.

With respect to Internet gambling, one issue that is often raised is the states reluctance to act for many years<sup>23</sup>. The answer lies in the composition of online services. They are products of the convergence of media, telecommunications and information technologies, infrastructures and services. Previously, each of these areas had been regulated separately (Keller, 2011). Also, there was a common understanding among the liberal democratic states that the Internet should be left unregulated (Crews Jr. and Thierer, 2003, Cox, 2003). The major economies of the world adopted the position that services provided on the Internet should be market led and governments should adopt a policy of market competition and limited intervention<sup>24</sup>.

However, states saw the importance of limiting this libertarian approach as, very quickly, the Internet came to be also associated with increased threats to security and well being in general<sup>25</sup>. In 1997, the Heads of State and Government of the 40 member States of the Council of Europe have suggested that a European policy was needed for the use of the digital communication platforms in order to ensure they are used with respect for human

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<sup>22</sup> Please see Section 3.4.

<sup>23</sup> For US-Gambling the request for consultations was made on 13 March 2003 although Internet gambling sites started appearing in 1994. In the EU, the first gambling case where involving Internet use was *Zenatti* and it was filed in 1998. (Case C- 67/98 *Questore di Verona v Diego Zenatti* [1999] ECR I-07289)

<sup>24</sup> Their views can be found at the documents produced at G7 Ministerial Conference on the Information Society held in Brussels in February 1995 and the Ministerial Conference on Global Information networks held in Bonn in July 1997. The OECD also adopted this view both at the conference in Turku, Finland in 19-21 November 1997, entitled "Dismantling the Barriers to Global Electronic Commerce" and the Ministerial-level conference in Ottawa, Canada, entitled "A Borderless World -- Realising the Potential of Global Electronic Commerce" held in October 1998.

<sup>25</sup> Digital Millennium Copyright Act in 1998 is a well known example. (H.R. 2281--105th Congress: Digital Millennium Copyright Act. (1997).

rights and cultural diversity, fostering freedom of expression and information and maximising the educational and cultural potential of these technologies.<sup>26</sup>

The protectionist voices increased also because governments have realized that establishing a degree of control over communications and transactions conducted over the Internet is feasible<sup>27</sup> (Goldsmith, 2003) and that there is increased time pressure on their existing economic and political agendas to negotiate their particular interests through the multiplicity of governance regimes they have committed to comply with.<sup>28</sup> These realizations have led to adoption of a series of protective measures by the states whose populations have been targeted just as in the case of gambling.<sup>29</sup> In time this prohibitionist impulse to any (unauthorized) online gambling activity left its place to acknowledgement of the widespread use of the Internet and other new digital communication platforms for gambling services. Therefore, a period of re-structuring and adaptation of gambling regulations has started.<sup>30</sup>

In the course of years not only confrontations among parties that have conflicting interests and the ensuing rulings of the supranational and national courts<sup>31</sup> but also collaboration and negotiation efforts among parties with shared interests, social, economic and political concerns have become inputs that shape and limit the adaptation of national gambling policies, a process through which the entire global gambling industry has been changing in the form of a chain reaction.<sup>32</sup> It has not been a smooth process so far. Evidenced mainly by the high profile lawsuits discussed in this dissertation and resistance and/or initial hesitance

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<sup>26</sup> Please see Article IV(3) of Final Declaration and Action Plan, Second Summit of Heads of State and Government of the Council of Europe, Strasbourg, 10-11 October 1997.

<sup>27</sup> Please see Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace, Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions by High Representative of the European Union for Foreign Affairs and Security Policy on 7.2.2103, Brussels.

<sup>28</sup> Just as in all dynamic industries, the gambling regulations will continue to evolve to keep up with the changes. However, the use of the Internet to provide gambling services has been a revolutionary change with major impact. In order to govern the complexities brought by this relatively strong impact some key changes to control mechanisms were implemented. Therefore the initial the struggle has been to hold its position as firmly as possible while the primary contours of the changes are implemented to govern the main complexities introduced by it. Once these contours (licensing, taxation, accountability seem to be the three main issues) are set the following negotiations will be based on them, until another revolutionary change is due. That is why, especially in this phase of the process, it is important for the interested parties to ensure that their interests are well represented.

<sup>29</sup> One example is the establishment of the Department of Defence Cyber Crime Centre in the US in 2001. In the EU, the E-Commerce Directive was issued mainly to protect electronic commerce consumers. A similar department to fight cyber crime is in the process of establishment as well. The Commission announced its intention to establish a European Cybercrime Centre in the EU Internal Security Strategy in Action (IP/10/1535 and MEMO/10/598), adopted on 22 November.

<sup>30</sup> Please see Section 4.6.5. for the US and Section 5.4 and 5.6. the EU.

<sup>31</sup> Please see Sections 4.4.1. and 5.5.2.

<sup>32</sup> Please see Sections 4.6.5. and 5.6.

of national governments to comply with supranational court decisions<sup>33</sup> the changing process can be characterized primarily by confrontation, resistance and challenges and it is unlikely to change given the high stakes<sup>34</sup> involved in gambling services. Given the diversity of interests and the right to remain particular, supranational entities assumed key roles in governing the complexities that fell within their jurisdictions.

### **1.3. Theoretical Framework**

Every research or inquiry carries a certain guiding ideology or a theoretical orientation whether the researcher is aware of it or not. The difference of an academic research from other studies is the necessity of the awareness and the relevant documentation of this guiding theoretical framework. When the data<sup>35</sup> about my target phenomenon, that is cross-border gambling services trade, is studied from an international law viewpoint; it becomes clear that the problem is placed in the interplay of state autonomy in governing services that relate to public morals and the responsibility of supranational organisations to protect trade liberalization objectives. This is one of the uncertainties in the emerging supranational legal order which expands on the relationship between the state and the supranational authorities, be it dialectical or dialogical, where each party stimulates and irritates the other while trying to proceed on its own path.

The extant literature regarding the emerging supranational legal order following World War II had initially been lead by advocates of constitutionalist perspectives which had been adapted to the international platform from legal centralist state structures. These perspectives were challenged by proponents of pluralism, a perspective that had initially been used to explain the duality of legal systems in colonial territories<sup>36</sup> but later adapted for the international platform. The realization of the novel complexities of the international and/or supranational settings led to some revisions to the classical understanding of the two perspectives, in order to preserve their descriptive and normative relevance. In time both perspectives adapted to the new circumstances and numerous interpretations as well as hybrid alternatives were developed. Among them, constitutional pluralism became one of the prevailing approaches in supranational legal studies.

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<sup>33</sup> Please refer to Sections 4.6.4.

<sup>34</sup> Economic, political and sociological. Please refer to Figure 1 at Section 4.2.

<sup>35</sup> These include but are not limited to academic articles, judicial rulings and administrative documents.

<sup>36</sup> Please see Antropology Law and Transnational Processes (Merry, 1992).

In consideration of these theoretical perspectives that had been widely referred in relation to the emerging supranational order, constitutional pluralist perspectives seem to provide an appropriate framework for the findings of this research both for descriptive and normative purposes. Universalizability of structures and particularity of public morals to each nation are also highly relevant concepts to the research topic that will be considered with reference to these perspectives. The aim in this section is to present these perspectives and concepts as used in this dissertation.

### **1.3.1. Constitutionalism (and constitutionalisation)**

An ordinary definition of for the constitution concept would be that “it is a formal contract drafted in the name of the people for the purpose of establishing and controlling the powers of the governing institutions of the state” (Loughlin, 2010:47). The understandings of constitutions and constitutionalism in their traditional sense have been gaining prominence since the eighteenth century, mainly after the American and French Revolutions. However they are considered to have gained worldwide acknowledgement only by the end of the twentieth century, mainly as a model for organisation and a means for claiming legitimacy for use of public powers (Grimm, 2010: 3). The relatively recent political changes in local and global political configurations, mainly the legitimization of exercise of public powers by international and supranational organizations, led to some important changes in how these concepts have been understood (Krisch, 2012b: 203). However, the initial motivation behind them which was legitimating of the use of public power by the people, through subjecting it to principles<sup>37</sup>, structures, processes and values governed by a constitution, remained at the core of these definitions (Jackson, 2009: 223, Loughlin, 2010).<sup>38</sup>

These traditional constitutionalist perspectives had been defined for the state level and had often been linked with the ideology of legal centralism which features state as a sovereign or autonomous, self-contained and internally integrated legal and political order with a distinct society and dedicated collective agency (Walker, October 2008).<sup>39</sup> Within this framework

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<sup>37</sup> The key principles of liberal democratic constitutions are separation of powers, respect for fundamental (individual) rights, independence of the judiciary and promotion of the judiciary as the guardian of the constitution (Loughlin, 2010:55)

<sup>38</sup> Martin Loughlin has defined five functional characteristics for constitution. Shortly, these are: “1. A constitution is a set of norms that emanate from a political decision... 2. The purpose of these norms is to regulate the establishment and exercise of public power.... 3. The regulation is comprehensive... 4. Constitutional law finds its origin with the people as the only legitimate source of power.... 5. Constitutional law is higher law. It enjoys primacy over all other laws and legal acts emanating from government...”

<sup>39</sup> Neil Walker points out that he refers to nation, people or the ‘state’ itself when with the term ‘dedicated collective agency’ (Walker, October 2008).

hierarchy also appears as an essential feature of constitutionalism whereas state organs and groups that exercise power are organised in a hierarchical form. Another important feature is the emphasis given to common over the particular, which is usually a cause for tension in situations of diversity within the ‘nation’ (Krisch, 2012b: 219).<sup>40</sup> Ordinarily, it is also accepted to be interlinked with the sovereignty concept and the exercise of sovereign powers. Within that context, the extending powers of supranational and/or international organizations are deemed to undermine both sovereignty and state level constitutionalist structures (Halberstam, 2012).

Even though the traditional understandings of constitution and constitutionalism are undergoing major changes, they are still relevant. One of the main explanations is that the international and supranational organizations, at least the ones mentioned in this dissertation are established by treaties signed among states that have considered themselves as sovereign constitutional units. Although these treaties have empowered their organizations with authority to decide on matters that were previously within sovereign areas of states; especially in cases of conflict and accommodation of competing claims of authority, taking these concepts as reference point answers legitimacy concerns as well as provides common grounds for communication (Halberstam, 2012:200).

### *Constitutionalism at Supranational Level*

The twentieth century has witnessed more and states agreeing to some segments of their public power, traditionally exercised by them autonomously, being exercised by supranational bodies with regional or global reach and to moving beyond the structures of the nation-state<sup>41</sup>. The states, each of which considered themselves as constitutional units<sup>42</sup>, have willingly become a part of these systems because upon acknowledging that in the new global setting, the political decision-making process is highly linked to each state’s international counterparts. This process required de-constitutionalisation at the domestic level which is then complemented by constitutionalisation at the supranational level (Petersmann, 2006, de Wet, 2006, Loughlin, 2010).<sup>43</sup> It is within this context that constitutionalism, a concept with

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<sup>40</sup> Nico Krisch, who is himself a proponent of pluralism, points out that this is typically exercised within the limits of human rights (Krisch, 2012b).

<sup>41</sup> Nico Krisch has called this a postnational setting where “the national sphere retains importance, but it is no longer the paradigmatic anchor of the whole order (Krisch, 2012a: 4).

<sup>42</sup> At this stage, it is not possible to identify all regional orders as constitutional orders.

<sup>43</sup> There are problems regarding the democratic legitimacy of this transformation. For further discussion please refer to Jackson (2009: 216-226), Krajewski (2008), and also Du (2010).

universal acceptance, has maintained its significance both as a normative framework and as a descriptive expression.

As can be construed from the paragraph above, discourse on constitutionalism at supranational level relates not only to trade organizations but to all international organizations with supranational powers. Given the research topic, in this section the academic discourse regarding the constitutionalism ideal or the process of constitutionalisation will be focused primarily on EU Law and International Trade Law.<sup>44</sup>

In this extensive body of work, both supranational constitutionalism and constitutionalisation have been defined in numerous ways. Accordingly, most proponents of supranational constitutionalism believe in a systemic unity with an agreed set of fundamental rules and principles to govern the global realm. Also, coherence and a hierarchical order for conflict resolution is often referred to as necessary components of constitutionalist structures (De Burca, 2009). The constitutionalisation of supranational law represents the direction of the transformation process of the present structure towards a constitutionalist one, one that is reconfigured for the political organization of the supranational level and the availability of mechanisms to that effect, a judicial structure being the most essential one by (Loughlin, 2010).

Indeed, the proponents of the constitutionalist structures in the international sphere have mostly based their claims on constitutionalisation by judicial process (Cass, 2001, Petersmann, 2006). Although, historically, the national constitutions were not necessarily the products of judicial decision making processes, in international law, the judiciary ended up assuming the central role in developing constitutional norms (Loughlin, 2010).

Some ambitious constitutional approaches to supranational law claim that the WTO should not be viewed simply as an institution promoting economic welfare through trade liberalization but more as an institution of the wider international community that promotes liberal democratic values, of which the UN, ILO, ICHR are also members (de Wet, 2006). This claim has become doubtful especially after the granting of WTO membership to states which do not come from liberal democratic traditions, the most significant example being China. Moreover, the WTO judiciary has so far limited its analysis to trade related issues,

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<sup>44</sup> It mostly relates to analyses of the judicial functions, the structure and the powers of WTO.



leaving evaluation of human rights or labor-related aspects of the disputes to the respective international bodies.

Given that the WTO's member states come from various backgrounds and conflicting governance traditions, targeting the establishment of a world state<sup>45</sup> or forming an community beyond the state, with agreed upon fundamental rules and principles to govern the global realm is not a realistic goal in the current setting. In the WTO context, it is safe to claim the presence of a sectoral community of states and regional organizations which have agreed to the terms of the founding treaties to further their common economic interests and also, -to a degree- their political interests. The integration level of the WTO community does not indicate further goals, either. Therefore, for now it is safe to consider that the WTO's role in international law has a narrower scope than it was once thought to have.

Like the WTO, the EU is treaty based, its origins are rooted in structures of international law and its judicial organ, ECJ, has assumed the central role (De Burca, 2012: 105). However, the constitutionalisation process that the EU is going through, evidenced by its overall institutional structure, higher integration level and the extensive powers granted to the ECJ, is at a more advanced stage (de Witte, 2012: 55). The principles of direct effect and supremacy<sup>46</sup> of EU laws are strong suggestions of the integration level and the direct relationship with the EU citizens and the EU institutions.

What's more, EU's powers are comprehensive which facilitates its institutions to reach decisions and make policies in consideration of civil, political, and social rights as well as market rights (Barnard, 2010, pg. 30). This is because its development allows for and benefits highly from a doctrinal coherence based on liberal economic and political values which facilitate the narrowing of the gap between economic and human rights law (Keller, 2011:4). As also explored further in Section 5.3 of this dissertation, the common traits of a constitutional order<sup>47</sup> exist for the EU more than others, despite the fact that a proposed constitution was rejected in 2004<sup>48</sup>. The EU governance system is complex with regulatory

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<sup>45</sup> The world state was first argued by Anacharsis Cloots, his books have not been translated into English from French. Therefore I refer to a secondary source which cites *La république universelle ou Adresse aux tyrannicides* (1792) as the source. (Kleingeld and Brown, 2011).

<sup>46</sup> Please See Section 4.3.2.

<sup>47</sup> Above, these have been pointed out as a systemic unity with an agreed set of fundamental rules and principles and coherence and a hierarchical order for conflict resolution.

<sup>48</sup> Nevertheless, its founding treaties are considered a constitutional charter and the EU itself a vertically integrated legal order (Fabbrini, 2010: 244)

powers vested in both national authorities and EU institutions, which have been sometimes referred to as multi-level governance system (Hooghe and Marks, 2001: 66).<sup>49</sup>

The primary criticisms raised against constitutionalism relate to diversity of the supranational space. They question whether a perspective that was initially formulated for the national level and reached relative success in terms of achieving unity, coherence and hierarchical structure is suitable to comparably very diverse populations of the world (Grimm, 2010). These goals are arguably utopian and the process to reach them would increase tensions (Krisch, 2012a: 67).

### **1.3.2. Pluralism**

#### *Origins*

The idea of legal pluralism was initially articulated to explain the situation in colonized societies where the laws implemented by the colonial authorities did not necessarily replace all the laws and customs previously existing, and the two systems existed alongside each other (Merry, 1988). This finding was in contradiction with the prevailing ideals at the time of the legal centralists,<sup>50</sup> according to whom “law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions”(Griffiths, 1986: 3) The legal pluralists have criticized the legal centralists and previous legal research for failing to capture the interactions among the systems or power inequalities (Merry, 1992).

After the academic discourse on the international legal system gained momentum, along with the impact of globalization, parallels were drawn between the challenges posed by laws of former colonial authorities on laws of colonized societies and the expanding scope of international law on the traditional understanding of state sovereignty. Thus, legal pluralism theory moved into the mainstream of legal discourse from the specialist discipline of legal anthropology<sup>51</sup> (Michaels, 2009). Consequently, the scope of the use of legal pluralism expanded and the different situations in which different kinds of legality co-exist in

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<sup>49</sup> Please see Section 5.3 and White Paper on Multilevel Governance (2009) Van Den Brande & Delebarre, M., The Committee of the Regions.

<sup>50</sup> The proponents of legal pluralism have claimed that legal centralists hold on legal theory has set an obstacle to the development of descriptive theory of law. The ideology of legal centralism was so prevalent that all legal developments were explained in theoretical boundaries. Therefore, the initial effect of the emergence of legal pluralism was destruct the previous belief that the actual practice of the legal system is different than what it was aimed to look like (Griffiths, 1986).

<sup>51</sup> Ehrlich (2001) and Engle (1988) were the pioneers.

indeterminate relations in the same social space began to be defined by this theory. As such, the interactions of the WTO, EU and national legal systems became a subject of the legal pluralists as well, with legal constitutionalism replacing the legal centralism as the alternate (Krisch, 2012b, Cotterrell, 2009). Especially after this shift, a great variety of definitions were provided for legal pluralism. For purposes of this dissertation it is defined as the presence of multiple sites of governance that seek to regulate the same incidents, whereas the sites of governance will be limited to officially recognized legal systems.<sup>52</sup> This limitation exists because other normative systems such as religion or customary traditions are not a part of the research.

### *Pluralism at Supranational Level*

Legal pluralism theory holds the descriptive advantage over constitutionalism especially when legal order at international or supranational level is taken as a starting point for the analyses (Griffiths, 1986, Krisch, 2012b). Such is the case especially because of the lack of clear hierarchy as supranational level consists of and “interacts with a multitude of coexisting, competing and overlapping legal systems at many levels and in many contexts” (Tamanaha, 2007: 25). Therefore, there is a reoccurring tension between the autonomous regulatory powers of the traditional state and the rule-making power of the international bodies that limit them. Therefore, at opposite sides of this tension, constitutional approaches aim for hierarchy and coherence whereas pluralist approaches deem such ends not only impossible but also undesirable approving instead “the value of diversity and difference amongst and between national and international normative systems and levels of governance and applauding competition, diversity and lack of coordination” (De Burca, 2009).

This debate is clearly relevant to discussions surrounding the limits of international rule-making in relation to public morals, which are characterized by their particularity. The cases analyzed in this thesis also suggest that when the subject of the disputes is related to gambling or similar issues of public morals, the judicial bodies of international trade organizations have embraced a pluralistic approach. Indeed, the language of the rulings of both judiciaries, the EU and WTO, emphasize that, given the diversity of the moral values of their members, the inconsistency of regulations concerning these areas cannot be resolved at the supranational level, and that the existence of multiple sources and modes of legislation

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<sup>52</sup> Some legal pluralists also give equal weight in their analyses to non-legal forms of normative ordering, such as religious norms, cultural practices and so on.

shall be recognized, even if the matter at hand has implications for cross-border trade (Barber, 2006). These rulings are valuable indications of the limits of any objective related to achieving universally shared values in the international community.

Despite its advantages, mainly owed to descriptive challenges of constitutionalism perspective, pluralism also has significant shortcomings. A well known normative challenge relates to the extent of moral diversity that should be tolerated, especially in cases of human rights. A strict legal pluralist approach has the potential to legitimize the sovereign state's abuse of power (i.e. Genocide in Kosovo and Hitler's Nazi Germany). The abuse of power does not have to go as far as genocide, it could well relate to, for example, animal welfare, labour rights and trade. A strictly pluralist approach may also lead to legitimization of trade of products produced by slaves, child labour and compulsory workers (Fitzgerald, 2011, Charnovitz, 1998). Assuming that these are deemed as important moral values worthy of universal promotion, mechanisms of constitutionalisation will offer more effective mechanisms than of pluralism. At the opposite end, imposition of the values of strong and rich states on the weak and poor is similarly undesirable. (Roth, 2011: 126-131).<sup>53</sup> Therefore, there is a delicate balance to strike among competing objectives. Despite its wide acceptance, according to Nico Krisch, the domination by the powerful is not an inevitable outcome of pluralism. He contends that, given the diversity in postnational setting, providing space for contestation among competing polities has the potential to produce more democratic results which will also reflect the existing indecisions (2012a: 25 and 301).<sup>54</sup> According to him the current manifold legal, economic and political interconnectedness of states shows, the web of relations among polities is not one dimensional and the classical understanding of state sovereignty has already become a concept of the past. In that context pluralism offers the most appropriate framework both for descriptive and normative purposes in comparison to that of constitutionalism.

### **1.3.3. Constitutional Pluralism**

As explained above, the remarkable interplay between the dynamic limits of state sovereignty and the extending jurisdiction of international organizations has been providing rich sources

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<sup>53</sup> For further discussion please also see (Beitz, 1991).

<sup>54</sup> He also argues that constitutionalist structures have not been able to deliver their promises for rule of law and consistency at domestic level. Therefore, these two issues shall not be held up against pluralism as fundamental flaws (Krisch, 2012a: 301).

for academic legal deliberation. Pluralistic and constitutionalist perspectives, often presented as irreconcilable, were utilized for this purpose. In time, some normative challenges and descriptive shortcomings of the strict versions of both became apparent. In order to overcome this some softer versions as well as new concepts inspired by them have been presented. Among them constitutional pluralism has been received with popular enthusiasm. In fact this perspective became so prominent that the co-editor-in-chief of *International Journal of Constitutional Law*, J.H.H. Weiler has expressed the situation very well when he said: “Constitutional Pluralism is today the only party membership card which will guarantee a seat at the high tables of the public law professoriate” (2012: 8).

The perspectives that can be grouped under constitutional pluralism have mostly been inspired by Kant’s interpretation of cosmopolitanism for the supranational platform. Kant advocated a legal order in which states remove their military forces and voluntarily sign up to a league of nations for peace-keeping in *Toward Perpetual Peace* in 1795 (Kant, 2006). As Baynes explained in his excellent interpretation, Kant’s ideas apply to this version of constitutionalist ideals by drawing an analogy between individuals giving up their “lawless freedom” and forming a state by agreeing on a civil constitution, and the sovereign states voluntarily agreeing on the international rule of law (Baynes, 1997). Accordingly states shall be deemed moral persons who do not have to give up their freedom to guarantee its provisional rights by forming a world state. The idea of a world state or world republic, as he calls it, is not appealing because such a structure will have to assume the same powers of sovereignty which belongs only to the nation state (Baynes, 1997: 220). Roth likewise argues that international peace and cooperation will be best achieved via an international legal framework that embraces moral diversity of states as oppose to imposing moral absolutes. However, he also adds that, these moral exceptions granted to the sovereign should not be allowed to undermine the greater international legal system, which provides strong foundation for orderly and respectful relationship among sovereigns (Roth, 2011: 130-1).

The constitutional pluralism concept was first introduced by late Neil MacCormick (1999). Later he was followed by Maduro (2003), Kumm (2004), Habermas (2006), de Wet (2006), Koskenniemi (2007), Walker (2008), Roth (2011), Halberstam (2012), De Burca (2012) and others. The primary difference between these scholars and proponents of constitutionalism is their disregard for unilateralism, legal centralist ideas and a strict hierarchical ordering of institutions for the international platform. However, they still deem constitutionalist

structures important as normative and symbolic frameworks for the analysis of contemporary issues of the supranational legal order (de Wet, 2006).

The constitutionalist aspect of constitutionalist pluralism perspectives represent coherence of the whole, a universal framework for thinking about law and the exercise of power in the name of law (Kumm, 2004). It is essential to conceptualize the emerging global order in constitutionalist terms to analyze contemporary issues of the supranational legal order that are a mix of empirical and normative factors which may lead to fragmentation. This line of thought can be found in the recent works of Matthias Kumm, Neil Walker, de Wet, Grainne de Burca some of which have been referred to throughout the dissertation. These relatively new proposed frameworks for the perception of the international legal order are not far from capturing the actual evolution and practice. They are also more viable alternatives to strictly pluralistic views. Variations exist for constitutional pluralism's conceptualization but they mostly acknowledge each state's inherent right to preserve its autonomy in regulating areas of public morals does not reduce the supranational integration project to simple cooperation agreements. These qualities make constitutional pluralism an appropriate choice for this research, so I also choose to observe my target phenomenon from the very same perspective.

The constitutional pluralism concept as used in this dissertation can be defined as follows: The pluralistic aspect of this view allows the acceptance of differences among the multiple sites and recognition of the benefits of the dialectic of their authority claims and also between universal and particular values. This acknowledgment in turn allows resolving conflicts that cannot be resolved via judicial or political order or by reaching terms of accommodation via dialogue and deliberation. Consequently, it assumes the existence of an international community with commonly negotiated and shared principles of communication for addressing conflict and universalizability of these principles.<sup>55</sup>

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<sup>55</sup> Cover has defined a version of legal pluralism that corresponds with these less ambitious versions of constitutionalist views and his version of legal pluralism is also able to provide a comprehensive explanation of the implication of public morals-related rulings. His version of pluralism is placed in between strict territorialism and universalism. For him, successful mechanisms, institutions, or practices should aim to strike a balance between the two by embracing both the particularities of the local and the international legal order at the same time. For that purpose, he believes that preservation of multiple sites for contestation and also an interlocking system of reciprocity and exchange is of essence (1985).

## *The Analysis*

In this dissertation the developments at supranational and international levels that relate to the Internet gambling<sup>56</sup>, as a services trade item that concerns public morals, is examined in the light of the perspectives presented above. The observation shows that, the conflict resolution processes of both of constitutionalisation, that is supranational judiciary and of pluralism, which are non-judicial methods like negotiation, mutual persuasion, political processes etc., took place before, during and after each other. The supranational judiciary acknowledged each nations right to remain diverse while the other processes took place based on the presumption and/or acknowledgement of this right and with motives other than trade liberalization, such as customer protection, economic welfare and politics.

The data produced in Chapter 4 and Chapter 5 show that WTO and EU rules regarding trade are formulated to accommodate diversity in certain areas, public morals being one of them. This acknowledgement of diversity of public morals via exceptions and derogations provisions in the establishing treaties was complemented with judicial systems equipped with mechanisms to avoid exploitation of these provisions. While the judicial process was ongoing, there were also communications and negotiations that sometimes lead to cooperation among interested parties<sup>57</sup>. These processes were born out of conflict and they were mostly strenuous and often not very constructive. However, they are significant in showing that various incentives<sup>58</sup> lead states to interact in a variety of contexts. They also show that, despite judicial acknowledgement of state autonomy in certain areas, these do not necessarily remain diverse and fragmented. However, the flexibility provided them with more space to negotiate the terms of trade in this area. Therefore, in the Internet gambling example, the constitutionalisation process of WTO and the EU had been strengthened by accommodating these divergences and the processes of pluralism.

This finding is limited to this example as gambling is a special topic. Most states, in principle, accept that whether to prohibit or permit foreign provision of gambling services is a matter to be decided at state level. In that sense the states are not under political pressure to adhere to or adopt a common value system. Therefore, the goods or services trade of items

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<sup>56</sup> For more detailed information please refer to Section 1.2.

<sup>57</sup> Please see Sections 4.6.5 and 5.6.

<sup>58</sup> In the Internet gambling services example addressing common concerns regarding money laundering, consumer protection and

that relate to human freedom such as free flow of information may produce different findings, where there is a much stronger motivation for universalization of values in such areas.

#### **1.4. Research Methodology**

Knowing my research question, unit of analysis and theoretical perspective, I need to choose a certain research methodology. Declaring research methodology is important because by following certain shared methods and standards in collecting and analyzing data, the researcher makes sure that his or her research is replicable by others. Consequently, this replicability and the use of correct tools provide the reliability and the validity of the findings. In order to address these mentioned criteria, I choose the methodology of ‘case study’. Lin defines case study as follows:

In general, case studies are the preferred strategy when “how” or “why” questions are being posed, when the investigator has little control over events, and when the focus is on a contemporary phenomenon within some real-life context. (Lin, 2007: 1)

This research fits the criteria above. Survey or other strict strategies are not suitable for this research since the test is not of a well-defined hypothesis. The targeted focus areas are the details, complexities and exceptions of a broad process. Action research or similar types of methodologies are not also suitable since the ongoing discussions of online gambling are not controllable. The aim of this research is to find the exceptions of the general understanding and the theorization of services trade when public moral issues are involved. The case study is the foremost methodology in getting the roots and details of a social phenomenon.

It seems that a comparative case study would have been appropriate as well, given that the data collected are of two jurisdictions with sufficient commonalities. However, my target is to explore the scope of the autonomy of the states with regard to the provisions of public morals exceptions in services trade in general. For this purpose not only their differences and commonalities but the richness of each jurisdiction’s experience proved to be very revealing. Nevertheless, there are comparisons of the findings among jurisdictions and also with the general theories and concepts of services trade. As a result, this research is conducted in the form of a case study where interstate online gambling trade is the unit of analysis.

#### **1.5. Data Collection and Analysis**

The guiding question of the research is “Does the indeterminacy of the public morals exceptions in supranational trade regimes reveals fundamental flaws in the design of those regimes as they apply to trade in services?” The unit of analysis is the gambling related



dispute among Antigua Barbuda and the US as members of the World Trade Organisation (WTO) and the judicial and administrative developments in European Union (EU). The evidence and the sources of data should be in line with the above question and the unit of analysis. The goal herein is to capture the broad developments at supranational level in the online gambling sector. Therefore the researcher is positioned as a meta or a second-order observer who follows the discourse from a certain distance.

This is also called as “macro legal research” (Siems, 2008). According to M.S. Siems macro legal researches are concerned with general concepts, problems, and principles of the law, including legal philosophy and legal theory. A topic he gives as an example of reaching originality in macro legal research is very close to the topic of this research. That is “a research based on the consideration that state-based law in the traditional sense becomes a component in a complex network of national, transnational and international private and public norms.”

When the researcher follows a lengthy process within the society from a certain distance he or she does not get involved with the details of data but only looks at the function of that specific data within the discourse of the evolution of a certain phenomenon. Therefore some of the data sources below resemble doctrinal research data or conceived as simply a definition. However, this research and its methodology see those sources as empirical evidence since these are the context, history and the processes that comprise the target unit of analysis, namely the discourse of online gambling and takes a macro perspective looking at its data.

In order to achieve a deeper understanding of the topic, the following range of data were collected:

- The definition and general understanding of gambling,
- The socio-historical discourse of gambling,
- The differences between land-based gambling and online gambling,
- The economic dimension and the perspectives of the industry players,
- The gambling regime in the US at federal level,
- Relevant principles of the GATS,
- In depth analysis of the *US-Gambling*<sup>59</sup>,

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<sup>59</sup> DS 285 *Antigua & Barbuda v United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*.

- The gambling regime in the EU,
- An introduction of the governance system of the EU and the relevant administrative procedures,
- An introduction of the relevant primary treaty obligations in the EU,
- An account of the gambling related developments within the EU,
- Analysis of the gambling related disputes at the ECJ.

This broad range of data had been analysed via the generalized theoretical lens of constitutional pluralism. Each datum had been documented and questioned while positioning them on the broad framework of constitutional pluralism. In most cases it fit and explained the situation well, while in certain cases it contrasted the broader framework and the situation had to be explored more closely. The variation of the data sources helped to capture the online gambling phenomenon from a wide angle<sup>60</sup>. The contrasting parts of data in different sources were not treated as anomalies but rather as a soft triangulation was preferred, where the variety of data sources increases the complexity of the description of the phenomenon.

## 1.6. Overview

This dissertation starts with the definition of the term *gambling*, which is defined via a structural analysis in the second chapter. The objective of this chapter is to identify the main components of the definitions of gambling in the US and the EU and to introduce the new phenomenon of online gambling. A significant finding of this analysis is that despite similarities in the primary components, which are chance, stake and prize, used in defining what gambling is, there are significant differences even in how these three concepts are defined. In addition via implementation of specific exclusions and differential treatment of certain activities, the variations of definitions of gambling and the discrepancies among national legislation increase even further, making the gambling concept particular to each nation.

The third chapter of this thesis explores the gambling concept from a sociological perspective in the EU and in the US. A brief historical background relates the circumstances under which gambling has been transformed into a legal item of the services sector from a vice that had been occasionally tolerated, mainly for economic purposes. This transformation occurred in parallel with the changing role of the (liberal democratic) states in governing moral matters.

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<sup>60</sup> Yet a hard triangulation of data, where certain specific details of a data source are stripped for the sake of rigid and strong theorization was not applied.

More and more states passed laws regulating provision of gambling services rather than prohibiting them and by the 1980s in the US (Moran, 1997) and by the 1990s in the EU (Kingma, 2008) it had already become a mainstream leisure item, albeit one with a moral dimension (Magder, 2006). In relation to this transformation, some religious, moral and sociological approaches to gambling are introduced. Identifying the states' incentives and the reasons underlying the general public's desire to preserve state autonomy in controlling gambling services is possible only via an exploration of the moral and social essence of gambling from a historical perspective<sup>61</sup>. These incentives and reasons, specifically public morals, constitute a fundamental part of the judicial decisions analysed in the following chapters. The conclusions of the first second and third chapters constitute the necessary groundwork for the rest of the analysis where any gambling related differences among the states are grounds for the disputes examined.

In the fourth chapter, the public morals exception in international trade law is examined, primarily via the example of the *US-Gambling* case, the first WTO dispute in which a public morals exception was invoked as a justification for national restrictions placed on trade liberalization commitments. The details of this case and its analysis strikingly display the WTO courts' challenging task in upholding a nation's right to protect its public morals while assessing correctly whether relevant restrictions are invoked merely to disguise restrictive measures in violation of their trade liberalization commitments, given the indeterminacy of the public morals concept. The Panel's and Appellate Body's rulings are indications of the world's most comprehensive trade organization's interpretation of the limits of state autonomy in regulating areas where national control is considered essential to maintain public order and protect public morals, but which are otherwise subject to international trade. In addition to exploring the multidimensional connectedness of the states at supranational level and the dynamism of the interplay between the limits of state autonomy in regulating public morals areas and the supranational trade commitments, this chapter also draws conclusions as to the role and authority of the WTO in the international legal system.

The fifth chapter analyses the responses of the EU institutions and the EU member states to the cross-border provision of online gambling services via the Internet, from service providers established in one EU member state to the residents of others. The extensive case law and a variety of administrative actions and communications at the EU level provide a rich

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<sup>61</sup> Please see Section 3.2.1.

source of data for analyzing whether the diversity of national regimes in public morals areas, such as gambling, is a major threat to the overall integration process. Given that, compared to the WTO, the EU's integration level is much higher the available mechanisms for conflict resolution and the incentives to address shared problems are much higher. Therefore, in the EU context, the main focus is to observe the judicial, administrative and political mechanics of the EU and deliberate as to the most appropriate perspective for descriptive and normative purposes.

The challenges presented in earlier chapters that the WTO, the EU and their member states have faced in balancing the values of trade liberalization and public morals have significant implications regarding the limits of the applicability of free trade principles in areas relevant to the public morals of the states and the scope of state autonomy in regulating these areas. The sixth chapter first defines these limits by contrasting the rulings and the review processes of the WTO and the EU judicial bodies and discovers that the supranational trade organisations recognise the diversity of public morals and their member states' right to regulate these areas in accordance with their own particular needs. After finding that there is universal acknowledgement that the regulatory authority shall be ultimately based in the diverse moral conditions of the networks of the communities that the regulation at issue serves (Cotterrell, 2008), this acknowledgement in turn constitutes the limit of the applicability of the provisions that promote trade liberalization (Krajewski, 2003: 57). The states' autonomy, on the other hand, is limited by the type and the extent of the measures that it can implement, given that these bear consequences mostly for the trading rights of their trade partners, members of the same organizations. The overseeing organizations' authority, therefore, allows them to review these measures to avoid the exploitation of the public morals exception and to protect the primary treaty objectives. This, in turn, has the effect of protecting other member states' trading rights affected by the subject measures.

## 2. Structural Analysis of the Definition of Gambling

How gambling is defined by law and society is an important factor in how presumptions are formed regarding its cross-border trade. Even the states that have established liberal gambling regimes within their borders have been rightfully concerned about its cross-border provision. In defence for preservation of the national regimes they emphasized the particularity of their moral values and the importance of national control for implementation of the public policies, each of which have been recognized as legitimate justifications.<sup>62</sup> The definitions are significant as they are constructed to reflect the states concerns and policies. Therefore the information provided in this chapter is significant in understanding the extent of divergences among jurisdictions as reflected in their definitions of gambling and whether Internet gambling requires a distinct definition.

The proliferation of cross-border provision of gambling services had led to increased volume of interactions among the states, mostly in the form of conflicts. The central themes these interactions have been the differences among public policies and national regulations within the context of international trade obligations. However the gambling concept, both in definition and scope, has regularly escaped the limelight. The primary reason behind the lack of interest in this topic has likely been that range of games preferred by the online gambling service providers were games that have been traditionally considered gambling, such as casinos, betting and poker. As a result of this, coupled with the assumption that everyone knows what gambling is<sup>63</sup> the definition of gambling has rarely been contested in gambling related disputes at the supranational level. However, for any analysis such as this elaborating on the significance of preserving trade liberalization arrangements while acknowledging state autonomy in regulating gambling services and particularity of public morals to each nation, an analysis of whether there are sufficient commonalities on the definition and scope of the core concept, gambling, and constitutes an essential initial undertaking.

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<sup>62</sup> In the WTO structure, the individual state's right to regulate the supply of services within its territory in order to meet national policy objectives has been specifically recognized. Please see Preamble, GATS. In the much more integrated EU structure, the priority in regulating a public morals area is again under the authority of each EU member states unless it can be clearly established that there is need to act at the EU level. (This is called the subsidiarity principle. For further information please see Section 5.3.1.) Moreover, in both jurisdictions derogation from treaty objectives can be justified on public morals and several public policy grounds as will be explored in detail in the following chapters.

<sup>63</sup> In 1978 this approach was articulated by Lord Rothschild in the Final Report of the Royal Commission on Gambling ,UK Government: "Almost everyone knows intuitively what gambling is—buying the chance of making money; taking a calculated risk because of potential reward; engaging in an action or series of actions resulting in a favourable, unfavourable or neutral outcome and so on....".

In this chapter, initially, the term *gambling* and other relevant terminology are introduced. The three fundamental features of gambling, chance, prize and stake<sup>64</sup> are also analysed in this first section. There is hardly any disagreement on whether traditional games such as lotteries, sports betting and casino games are gambling. On the other hand, new types of games are introduced frequently, some in the form of social gaming, and their classification depends on the prescribed definitions. There are also activities that do possess all three features but are traditionally not considered gambling and are thus specifically excluded from gambling legislation.<sup>65</sup> These sections are followed by a comparison of land-based and online gambling will follow. This issue will be analysed from the perspectives of the states and the supranational courts separately.

## **2.1. Relevant Terminology and Definitions**

Gambling is very broadly defined as staking or risking money, or anything of value, on the outcome of something involving chance.<sup>66</sup> Legislators often adopt a version of this definition with the intention of covering all traditional and new types of gambling that did not exist at the time of the legislation. Therefore, participating in a lottery, betting and all types of casino gambling are intended to be included in this term.

Indeed, in the EU, E-Commerce Directive, the term gambling refers to games of chance, betting and lottery transactions which involve wagering a stake with monetary value.<sup>67</sup> According to the Services Directive the primary features of gambling are chance and stake with economic value. It is specifically mentioned that this definition includes all types of gambling including lotteries, gambling in casinos and betting transactions.<sup>68</sup> The Audiovisual Media Services Directive also uses a similar language defines chance, stake –representing a sum of money- as the fundamental features. It specifically points out that the definition is intended to include online games, lotteries, betting and other forms of games of chance. The definitions are very broad because these directives have prescribed these definitions to exclude gambling services from their scope. In case a directive that regulates any aspect of gambling services is enacted, a more detailed definition would be necessary to define its

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<sup>64</sup> Stake is also referred to as *consideration*.

<sup>65</sup> One commonly referenced example is day-trading in stock market.

<sup>66</sup> Online dictionary 2009, Random House, viewed 5 February 2009, <http://dictionary.reference.com/browse/gambling>

<sup>67</sup> It excludes promotional competitions or games the purpose of which is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services. Please see Preamble Paragraph 16 and Article 1 of Directive on E-Commerce.

<sup>68</sup> Article 2(2)h Services Directive

scope. There are examples in national legislations as well as federal legislation such as IGBA §1955(b)(2) in the US. It first defines the term gambling to include pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances but then defines a number of exclusions to define the scope of the legislation,

As the examples above also show games of chance and gaming are the two other descriptors most commonly used interchangeably<sup>69</sup> with gambling. Sometimes the term *gaming* is also used to differentiate certain types of gambling from others. For example, in US usage *gaming* refers to engaging in gambling activities that are legally allowed (Humphrey, 2012). In Article 6 of Gambling Act 2005 of UK, *gaming* is used for games of chance and the definition of games of chance excludes betting and lotteries.<sup>70</sup> In the international courts these nuances in terminology are sufficiently insignificant that they have not obstructed communication thus far. The courts generally refer to the national legislation defining these concepts, as they usually seek to address a number of nations whose native languages differ.

### *Internet Gambling*

As for the definition of online gambling, it is commonly agreed by the WTO and the EU Courts that the use of the Internet as a medium should not affect the laws that apply to gambling services provided via more traditional means.<sup>71</sup> Therefore, there is uncertainty as to whether a separate definition is necessary for Internet gambling for judicial or legislative purposes. Nevertheless, a definition has been proposed by the European Commission in has proposed a definition:

Online gambling services are any service which involves wagering a stake with monetary value in games of chance, including lotteries and betting transactions that are provided at a distance, by electronic means at the individual request<sup>72</sup> of a recipient of the services.<sup>73</sup>

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<sup>69</sup> Preamble and paragraph 22 of the Audiovisual Media Services Directive.

<sup>70</sup> In this dissertation the term gambling will be used to define both legal and illegal gambling and it will cover all activities of gambling including betting, lotteries, casino games, slot machines, and so on.

<sup>71</sup> Please see section 2.3.3.

<sup>72</sup> A footnote at the same definition emphasizes that “at a distance” and “at the individual request” means “a direct on-line request from the recipient to the Internet gambling operator without any reliance on any intermediaries such as shop staff working at a point of sale. To the extent that the distance transaction takes place through a network of natural persons acting as intermediaries using electronic means it is not intended to be contained in the above definition.”

<sup>73</sup> Article 2.1. of the Green Paper

In the US, there is not a definition of online gambling that corresponds to the definition above. However, Section 102 of the Unlawful Internet Gambling Enforcement Act of 2005 (UIGEA) amends the Wire Act of 1961 to make sure that the use of the Internet to facilitate gambling activities that are otherwise prohibited by state laws is likewise prohibited by law.<sup>74</sup>

### *Illegal Gambling*

Another term, the definition of which is of importance, is “illegal gambling”. In the US, the illegal gambling business has been defined at the federal level under the Illegal Gambling Business Act (IGBA) §1955(b). That definition encompasses any gambling business that violates the law of a state or political subdivision in which it is conducted, involves 5 or more persons in its operation and has been in operation for more than 30 days or exceeds a certain amount of gross revenue in any single day. The precondition of the violation of the state law is of utmost significance, as federal legislation leaves it to each state to determine its gambling laws and therefore the term’s definition and scope. Years later, in 2010, a similar definition of unlawful gambling was proposed by the Council Working Group in the EU. That group held that gambling services operators must comply with the laws of the countries where they offer their services and those national laws must be compliant with relevant EU legislation. Within this framework, if gambling services are operated without a licence, or outside of compliance with the laws of the relevant country, they may be considered unlawful.<sup>75</sup>

The definitions of illegal gambling signify recognition of the authority of individual states in determining their gambling regimes, initially in a federal setting and then in an economic and political union. Therefore, beyond the state level it is relatively easy to reach an agreement on the definition of illegal gambling compared to gambling itself.<sup>76</sup>

## **2.2.Fundamental features of Gambling**

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<sup>74</sup> The definition of “communication facility” in §1081, paragraph (5) of the Wire Act was amended in Section 101 of the UIGEA to mean “any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, radio, or an electromagnetic, photoelectronic or photooptical system, or other like connection (whether fixed or mobile) between the points of origin and reception of such transmission”.

<sup>75</sup> ‘Conclusions on the framework for gambling and betting in the EU member states’ adopted by the Council of the European Union at 3057th Competitiveness (Internal Market, Industry, Research and Space) Council meeting. Brussels, 10 December 2010. Council document 16884/10.

<sup>76</sup> The analysis of fundamental features of gambling will show how the three concepts that define gambling could be interpreted differently from one jurisdiction to another.



The definitions of gambling are almost always based on three concepts: chance, stake and prize. In legislations, these overarching definitions are almost always accompanied by exceptions to exclude activities not traditionally or legally considered gambling, such as, in the US, financial market activities including purchase or sale of securities, derivative instruments, and any contract of indemnity or guarantee.<sup>77</sup> In the UK spread betting is similarly exempted.<sup>78</sup>

In this section these three features and a few possible interpretations are explored. Differences in interpretation stem from the distinct historical experiences, social policies and moral values of each state. Differences hinder communication and constitute a major obstacle for agreement among states on common rules for gambling services.

### **2.2.1. Chance**

Chance is the absence of any cause of events that can be predicted, understood, or controlled.<sup>79</sup> It is the source of gambling's attraction and also of the reaction against it, as explained in the previous chapter. It is also the factor differentiating games of chance from other games the result of which is determined by skill,<sup>80</sup> such as chess. In the EU and the US, there is a common understanding that when an amount is wagered on the result of something that is purely determined by chance, as a rule that activity is gambling and shall be subjected to gambling related legislation.

In this regard one very important issue causing differences among jurisdictions is how they prefer to classify activities the outcomes of which are determined both by chance and player skill, such as poker and backgammon. Some states, including the UK<sup>81</sup>, consider the mere existence of chance sufficient to classify an activity as gambling while others, including the majority of US states, Germany, Italy and France have started to apply a predominance test to see whether skill or chance is the dominating factor in determining the result of a game.

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<sup>77</sup> Section 5362 UIGEA

<sup>78</sup> Article 10 UK Gambling Act 2005. This legislative exclusion does not necessarily impose on the views of health organizations and other non-governmental organisations dedicated to supporting individuals who are not unable to control their gambling habits. For example, a majority of such organizations recognize compulsively "playing" on the stock market as a form of gambling addiction (Segal et al., 2008).

<sup>79</sup> Online dictionary 2009, Random House, viewed 5 February 2009, <http://dictionary.reference.com/browse/chance>

<sup>80</sup> This differentiation is very important because as a rule games of skill are excluded from the scope of laws that regulate gambling.

<sup>81</sup> The Gambling Act 2005 of UK is one of the newest gambling acts of the world. In Article 5, games of chance is defined to include games that involve both an element of chance and an element of skill, games that involve an element of chance that can be eliminated by superlative skill, and games that are presented as involving an element of chance.

Indeed, until recent years, the prevailing approach was to consider the mere existence of chance, via a randomizing mechanism such as the throw of dice or draw of cards, sufficient to classify an activity as gambling. However, it has become clear that in some games, in the long run, the more skilful players always prevail over less skilled ones. Therefore, the predominance test has begun to be used to determine whether a game is one of skill or of chance.

In *In re Allen*, 377 P.2d 280 (Cal. 1962), the California Supreme Court defined the elements of a game of skill in the context of the game of bridge, which it upheld as a game of skill. It was resolved that “it is the character of the game rather than a particular player’s skill or lack of it that determines whether the game is one of chance or skill. The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor in determining the result of the game”. Also, in *USA v. Lawrence Dicristina*<sup>82</sup> the New York District Court ruled that poker qualifies predominantly as a game of skill.<sup>83</sup>

The idea of applying a predominance test seems fair and logical. However, the available methods and their application have proved more complicated than initially assumed (Borm and Genugten, 2001). This test ordinarily relies for its results on the average player. The next step is to observe a number of repetitions of a game such as an average player would play. Then a final calculation is made to find out whether the number of games won is sufficient to find that skill outweighs chance. In their critical analysis of the predominance test, Fiedler and Rock, who found poker to be a skill game, argued that, the test had too many variables and that even the applied time horizon persisted as a question of subjectivity (2009). Today, in various jurisdictions, despite many cases pending in the courts, the rules that govern gambling are indifferent toward poker and backgammon considering them forms of gambling (Kelly, Dhar and Verbiest, 2007).

At the supranational level, these differences present a difficulty for service providers, which are looking to provide their services across-borders. In previous sections, it has been pointed out that service providers are expected to comply with the laws of the state(s) to which they are providing their services. In that case, if a game is considered a skill game in one jurisdiction and a game of chance in the other, the service providers will be subject to two

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<sup>82</sup> *USA v. Lawrence Dicristina*, 11-CR-414, NYLJ 1202568480608, at \*1 (EDNY, Decided August 21, 2012).

<sup>83</sup> Therefore poker does not fall under the scope of the IGBA.

different regimes regarding the same service. The laws of the state they are providing their services from will not be relevant.

### **2.2.2. Stake and Prize**

A stake, also referred to as a wager, bet or consideration, is one of the three defining elements of gambling. It is something of value, in most cases of material or monetary value that is risked upon the result of a game or the occurrence or outcome of any uncertain event, venture, and so on.<sup>84</sup> The stake allows the player to participate in the game, the goal of which is to win the prize which is the third defining element of gambling and is also simply defined as anything of value. The test for determining whether there is a prize under the meaning of gambling legislation is usually whether an ordinary person would believe it has value, even if small (Csoka, 2008). In this section, the stake, the prize and the purpose of the game will be examined in relation to one another.

As mentioned above, the stake is compulsory for participation in gambling activities. In some games the amount of the stake and the prize are correlated; in some they are not. In the case of lotteries or slot machines, the amount the player may win is unaffected by the amount staked. In roulette, on the other hand, the prize is calculated as a multiple of the amount of the stake (Abt, Smith and Christiansen, 1985:41-42).

The incidental expenses or inconveniences necessary to enter a contest or a promotional activity are generally not deemed a consideration. Two common examples of incidental expenses are buying a stamp to send in entrance documents and/or items or paying Internet access fees to facilitate participation in games offered online. The outcome of this prevailing approach is not always obvious, and its application may be confusing at times. For example, if a player wins game credits from a free game, and wagers these game credits on a game of chance (to win a prize) that game of chance may constitute gambling under US laws, although no money was staked. Tempted by the opportunity to circumvent laws and regulations restricting the provision of gambling services, some gambling enterprises have formulated alternative staking methods which often do not escape the scrutiny of the courts or other review bodies (Csoka, 2008).<sup>85</sup>

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<sup>84</sup> Online dictionary 2009, Random House, viewed 13 February 2009, <http://dictionary.reference.com/browse/stake>.

<sup>85</sup> Competitions and Prize Draws, (2009), UK Gambling Commission. Available: [http://www.gamblingcommission.gov.uk/frequently\\_asked\\_questions\\_fa/competitions\\_and\\_prize\\_draws.aspx](http://www.gamblingcommission.gov.uk/frequently_asked_questions_fa/competitions_and_prize_draws.aspx) [Accessed 24 February 2009]

Varying approaches to the stake concept have become central to the legal status of free draws.<sup>86</sup> Free draws are lotteries in which the entrants are not required to wager anything as consideration. The organization of these types of lotteries for promotional purposes, with no gambling license, is considered legal in many jurisdictions. One example may be a promotion organized by a particular brand of soda, where the vendor gives away world cup tickets to a certain number of customers. In order to participate, the customers are required to check the number on their can of soda, on the company's website. There is also the flexible-entry method, in which the entrant can either buy a ticket by risking a stake or simply fill out a form. In this case, many jurisdictions require equal opportunity to both types of entrants in order to deem such a non gambling activity. The rules for these types of organizations become more and more complicated as the variety of examples increase year by year (Blakey, 1984, Csoka, 2008: 9-19, Cabot and Csoka, 2003-2004).<sup>87</sup>

In the recent years, in determining the legal status of social games provided via digital communication platforms, the absence of stake to participate in the game and the absence of monetary prize have become the deciding factors. Due to the absence of these factors these games escape oversight of state gambling regulators. The most common system for participation in these games is the "freemium" system. The players participate in the games with a limited amount of free chips they receive every day and the payouts for winners are with symbolic reward, often in the form of virtual currency. Typically, however, additional chips are available for purchase for players who would not like to wait for the next day to continue playing. In this case, the absence of a prize with monetary value becomes the primary factor that differentiates them from gambling.<sup>88</sup>

This section has shown that significance of stake and prize in classifying a gaming service as gambling or not and the diverse approaches that national gambling legislators may adopt. Despite these terms being defined in very similar ways, gambling policies shape and re-define their interpretation and scope. This diversity in their definitions is another indication that the activities that the societies perceive as gambling may be particular to each nation.

### **2.3.The differences of Internet Gambling from Land Based Gambling**

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<sup>86</sup> They are called sweepstakes in the US.

<sup>87</sup> Please also see footnote 85.

<sup>88</sup> Please see Social Gaming: Click Here to Play' (2012) Morgan Stanley Research. Also for further information please see pages 11-114 of Social Gaming in Europe (Schmid et al., 2013).

The gambling games offered via the Internet and other digital communication platforms are usually very similar probably because the service providers prefer to reach customers residing in jurisdictions other than the ones they are established in, with products they are familiar with. The difference stems from the consequences of the use of digital communication platforms which impacts the ease and frequency of consumers reach to cross-border gambling services. If we take into account that before the utilization of the Internet, the gambling regulators have not deemed consumption of gambling services abroad, when their residents travelled to these jurisdictions to consume those services, a cause for international dispute; the significance of the differences of Internet from land based gambling becomes apparent.

### **2.3.1. The Gambling Industry Perspective**

The gambling industry has always been among the first to utilize advances in new technologies. The invention of the printing machine, the increased speed of communication via postal service by train, telegram, telephone, television and finally the Internet have all been utilized by the industry soon after their invention. Most of these advances have created grey areas in existing legal systems and provided prospective service providers with new opportunities to circumvent the laws in force. Each time, the exploitation of the new technologies for such purposes triggered newer control measures, as expected. There are two striking examples of this phenomenon from the US.

The first example relates to the utilization of the postal services to facilitate, first, interstate and second, off shore lottery ticket sales. In the late 1800s, the Serpent, a lottery operated by the Louisiana Lottery Company, became extremely popular especially after other states prohibited their own lotteries. By 1877, Serpent tickets were sold in every state and ninety three percent of the Serpent's gross revenue was from out-of-state sales (Graham, 2002, Roberts, 1996-1997). After a fraud scandal,<sup>89</sup> the Serpent's license was revoked in 1890, and the US Senate passed laws prohibiting lottery advertising and operation via the postal services in order to avoid similar incidents (Britz, 2000:25-6). The Serpent then moved its operations to Honduras. In response, in 1895, Congress prohibited the importation of foreign lottery materials. This last Congressional measure ended the operations of the infamous Serpent (Schwartz, 2005:24) and of lotteries in the US for seventy years. The Serpent's conduct obliged federal government intervention in an area previously considered to be

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<sup>89</sup> This scandal implicated 23 of the state's senators.

exclusively under state control in an effort to stop the Serpent and to avoid similar future attempts.

The second example relates to gambling via telegram. The telegram was utilized to facilitate intrastate and international betting, initially on horse races and later in other sports competitions. In the late 1890s, places called poolrooms provided betting pools on remote races and were connected to racetracks and one another via an information line called the race wire. The race wire was initially provided by Western Union, the telegraph monopoly of that time. Operations later came into the hands of the criminal organizations, and despite allegations of highly corrupt practices, continued thus until the passage of the Wire Act in 1951, which prohibited the use of wire communication for betting businesses (Schwartz, 2005-40).<sup>90</sup> Years later, this Act has become the centre of discussions related to the legality of cross-border provision of online gambling services to the US when the US Department of Justice (DOJ) interpreted it as prohibiting all forms of online gambling, although the Federal Court limited that interpretation to sports betting.<sup>91</sup>

Especially in the second example, the use of telecommunication technologies for gambling purposes shows how quickly and efficiently technological advances have been utilized by the gambling industry and how difficult it is for legislators to foresee and formulate timely and effective solutions for contemporary problems in the absence of a strong policy. The Internet gambling industry was not very different in utilizing a new technology much quicker than the states realized the potential outcomes of the use of this media.

Eager entrepreneurs have also taken advantage of the legal uncertainty created by the use of the Internet in the gambling industry, establishing themselves as out-of-state service providers to offer instant access to real-time betting, sport betting, casino games, lotteries and

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<sup>90</sup> The Wire Act was enacted with the intention of stopping illegal bookmakers from using wire communication for business purposes. The Congress thought that if these illegal bookmakers could not get the information they needed to fix the odds, inform their customers of the results and thus pay off, they would go out of business. Thus, the Wire Act prohibits the use of wire communication by those engaged in the business of interstate or foreign commerce of betting or wagering for the transmission of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers.

<sup>91</sup> The US Court of Appeals for the Fifth Circuit ruled in November 2002 that the Federal Wire Act prohibits electronic transmission of information for sports betting across telecommunications lines but affirmed a lower court ruling that the Wire Act does not prohibit non-sports Internet gambling. Please see Section 4.3.1. of in re: Mastercard International Inc. Internet Gambling Litigation, 313 F.3d 257 2002, for the position of the DOJ.

peer-to-peer games<sup>92</sup> without being subjected to the laws of the countries they provide their services to. Realizing that the states at the receiving end of their services are inclined to obstruct the provision, they have tried to establish the legitimacy of the industry they have created with intense lobbying efforts and aggressive litigation. In Europe, they have challenged the existing state laws within the framework of the EU member states trade liberalization commitments. An account of their efforts can also be observed in the number of lawsuits they have filed, discussed in Chapter V herein. At the international level, Antigua and Barbuda (Antigua) have defended the right of such companies to continue providing their services to the US as per their trade liberalization commitments under General Agreement on Trade in Services (GATS).<sup>93</sup> Also, there are proponents of legalization and taxation of these services in the US Congress who have proposed bills for that purpose over the years (Vallerius, 2011).

Existing gambling service providers, on the other hand, were mostly cautious in utilizing the Internet in the beginning. As the customer base and the online gambling industry as a whole grew, in an effort to preserve revenues and market share, some existing service providers started to provide services online to the extent allowed by the jurisdictions they had been established in. Some examples are the UK National Lottery, MGM in Las Vegas, Mega Millions in the US<sup>94</sup> and casinos in Lower Saxon, Germany<sup>95</sup>.

This section showed that from the gambling industries perspective, until recently, the Internet has been a convenient way to provide services by escaping heavy regulatory burdens and restrictions. The Internet is just one of the last technologies utilized for this purpose. Its effects on national and supranational policies are still in progress.

### **2.3.2. The States' Perspective**

During the course of its history, the gambling industry has proved to be an industry, the strict controls of which are necessary to minimize consumer exploitation, tax evasion and other criminal conduct. The EU member states and the US states have authorized some forms of gambling in the confidence that their established systems were suitable to achieve the

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<sup>92</sup> Casino games, peer-to-peer card games, especially poker, and betting are the three major gambling types offered on the Internet. Lotteries, except for bingo, have attracted comparably less demand, probably because instant access does not result in instant results.

<sup>93</sup> Please see Section 4.4.1.

<sup>94</sup> Mega Millions is played in 42 states and the District of Columbia and the U.S. Virgin Islands. Please see History of the Game, Available: <http://www.megamillions.com/history-of-the-game> [Accessed 22 November 2011].

<sup>95</sup> This liberal approach had since changed (Hörnle and Zammit, 2010: 37).

necessary control mechanisms. Their goals were not merely economically motivated. In most cases, their acknowledgment of the unavoidable public demand for gambling had motivated them to meet that demand in a safe and controlled environment, without increasing demand by allowing an actual competitive market. The local industries had been subjected to heavy restrictions, in order to enable the government to control its reach and its quality and also, to facilitate economic and social policies.

In that sense, the most important difference between online and land-based gambling for the states is that the states have to bear the negative consequences of the provision of online gambling services within their borders although they have neither the jurisdiction nor the enforcement power to claim remedies for any wrongdoing, such as tax evasion and conduct threatening to customers and the vulnerable. Moreover, they do not benefit from the positive outcomes intended by their public policies regarding gambling, such as allocation of its revenues to the funding of public projects or the employment opportunities that the sector provides. Indeed, one of the important positive outcomes of the national gambling markets has been the considerable sums they have placed at the disposal of the state via taxes levied on the industry. The taxation of online gambling operations has proved complicated, thus leaving large sums untaxed.

In the US, the federal government took a stronger stance against online gambling companies and declared their activities illegal. Therefore, those companies could not voice their claims as strongly as in the EU, where it was more or less recognized that there was a grey area to be addressed. The contradicting claims of the online gambling industry and the EU state-licensed lotteries and Toto companies were expressed by the representatives of each at 2005 colloquium at the Faculty of Law, Tilburg University in the Netherlands.<sup>96</sup> In this confrontation, industry representatives argued that the harmonization of rules would be a more efficient method of meeting consumer protection and other public order objectives intended by national legislation. They also emphasized that the change was inevitable and that the EU should acknowledge that fact and play a decisive role (Arendts, 2007:41-52). The counter argument defended by the legal spokesman for the European State Lotteries and Toto Association Mr. Tjeerd Veenstra, was that the preservation of existing monopolies and

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<sup>96</sup> Later the results of the colloquium, which was also a part of a research programme on the regulatory aspects of gambling in Europe, were published in a series of three books (*The Regulation of Gambling, Crime, Addiction and the Regulation of Gambling and Economic Aspects of Regulation of Gambling*), which constitute one of the most extensive studies of the gambling industry in the EU to date.



exclusive rights systems was in the best interest of EU citizens and that it would not be possible to establish efficient control mechanisms in a liberalized market (2007:53-67).

The two conflicting views show that online gambling companies are willing to compromise on profitability rates, pay taxes and comply with the rules prescribed in exchange for recognition and continued business despite general scepticism as to the feasibility of achieving similar policy goals in a liberalized market.

### **2.3.3. The Courts' Perspective**

The two chapters following this one analyse the case law relevant to online gambling scrutinizing in detail the views of the WTO Dispute Settlement Body (DSB) and the ECJ on the subject and the primary issues of concern. This section only briefly mentions each court's view regarding the differences between online and traditional gambling.

The ECJ takes the view that EU member states are under no obligation to allow online gambling services of providers established in other EU member states. In relation to online gambling, the ECJ has observed that based on the "lack of direct contact between consumer and operator, games of chance accessible via the Internet involve different and more substantial risks of fraud by operators against consumers compared with the traditional markets for such games".<sup>97</sup>

However in relation to the question whether the Internet gambling market can be deemed separately from the sector as a whole, the ECJ has recently ruled that the Internet is only the platform through which betting services are offered and that the market should be considered in its entirety, independently of how and where the bet is placed.<sup>98</sup>

In *US-Gambling*, the question of whether there is a difference between land based and online gambling appeared before the Panel and the Appellate Body in two different contexts. First, when interpreting the US's Schedule of Commitments, they had to assess whether those commitments excluded provision of services via the Internet or gambling services in general. The Panel referred to the technological neutrality principle, finding that "the cross-border supply" referred to in GATS includes all possible means of supply where the service provider is not present within the territory of the member state where the service is delivered. Therefore, if a WTO member state has made a full market access commitment under Mode

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<sup>97</sup> Please see paragraphs 69-72 *Bwin*, paragraph 101-3 *Carmen*, paragraph 79-81 *Zeturf*.

<sup>98</sup> Please see paragraph 77 *Zeturf*.

1<sup>99</sup> and unless otherwise specified its Schedule, provision via the Internet shall not be treated differently from other forms of delivery.<sup>100</sup> Later in its analysis of restrictive US measures specific to online gambling, the Panel decided that the different means of trade could trigger different public morals and public order concerns. Therefore, the US regulations regarding non-remote gambling services and the fact that the US has been a significant consumer of land based gambling services did not have to set a standard for measures regarding online gambling<sup>101</sup>. The AB also approved the Panel's reasoning.<sup>102</sup>

Therefore, from the perspective of both the ECJ and the DSB, online gambling could trigger different policy concerns and thus require a different regime to tackle concerns specific to digital communication platforms.

## **2.4.Final Comments**

In this chapter the legal definition of gambling has been explored from various perspectives with the aim of discerning whether there are commonalities in what is considered *gambling* in both the US and the EU. Definitions are significant both at the national and international levels, not only in defining legality and illegality but also in facilitating communication, whether in the form of disputes or negotiations or collaborations. We found that, chance, stake and prize are the three common features of gambling in both jurisdictions. However, there are significant differences even in how these concepts are defined. In addition via implementation of specific exclusions and differential treatment of certain activities, the scope of gambling activities and legal gambling activities differs further from state to state both within the US and within the EU. The grounds for these divergences are numerous, ranging from the historical, political, and economical to matter of tradition as will be explored in the following chapter.

Nevertheless, the existence of a lucrative Internet gambling market serving an international consumer base, mostly with products traditionally considered gambling in both jurisdictions is also significant in showing that the peoples of these two areas have a shared taste for similar gambling activities and expect more or less similar range of services from gambling service providers. The shared consumer base can easily become a motivation in addressing

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<sup>99</sup> Article 1(2)(a) GATS

<sup>100</sup> Paragraphs. 6.281- 6.285 *US-Gambling* Panel Report

<sup>101</sup> Paragraphs. 6.498 and 6.521 *US-Gambling* Panel Report

<sup>102</sup> Paragraph 313 *US-Gambling* Appellate Body Report. Please see Section 4.6.3.5.

consumer protection related concerns via collaboration among jurisdictions while retaining national control over other fragile concerns related to public morality.

### **3. Gambling from a Moral and Sociological Perspective**

#### **3.1. Introduction**

“Play lies outside the anti thesis of wisdom and folly, and equally outside those of truth and falsehood, good and evil. Although it is a non-material activity it has no moral function. The valuations of virtue and vice do not apply here” (Huizinga, 1950: 6).

It is crucial to examine the moral and social essence of gambling in European and American society in order to understand the dynamics behind their gambling policies, the importance of retaining right to regulate and the relevant judicial rulings at the national and supranational levels. The recognition of moral and social policy differences among nations<sup>103</sup> and the states’ autonomy in governing their own domestic policies has been critical in securing membership in the international and/or supranational organizations that regulate various aspects of multilateral relationships and impose certain regulatory standards on their national legislations. When online gambling service providers invoked the international/ supranational trade liberalization commitments of the US and the EU states to secure continuation of their services, the contemporary policies of both regions, mostly to address economic and social concerns and long established moral concerns have allowed them to benefit from the exceptions and derogations clauses of the same treaties. Therefore, the social and moral aspects of gambling are central to the analyses in the following chapters as they constitute grounds for recognition of continued national control by individual states versus gambling’s economic value as a leisure service, a quality shared by the US and the EU markets.

The chapter starts with a brief historical background of gambling habits which will illuminate some shared experiences of the US and the EU. This discussion is followed by a review of the religious and the moral concerns that have greatly influenced gambling regulations, in the past. Lastly, some prominent sociological theories about gambling are introduced. These provide insight into how gambling gained wide acceptance as a leisure activity of economic value.

#### **3.2. History of Gambling**

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<sup>103</sup> and sometimes within nations

Lotteries, the casinos, betting and card games had all taken their place in social life by the 17<sup>th</sup> century and the term *gambling* came to represent the range of activities and structures that have become the basis of the gambling industry we know today. The history of gambling is generally considered to diverge for Europe and the US only after that point in time, most probably due to the different social and economic dynamics of colonial life as compared to life in Europe. Nevertheless, when examined closely, the timeline of attempts at legalization and prohibition of gambling follow a very similar pattern both in Europe and in the US. These parallels are very likely due to the shared experiences of the social and economic effects of the Industrial revolution, the Great Depression and World War II, the three major events that triggered changing attitudes towards gambling as a minor part of social changes of greater scale.

Throughout these periods the success of gambling policies depended on containing the gambling issue within a state's borders. Doing so was not always easy, however, when neighbouring states adopted more relaxed gambling regimes. The availability of gambling services at purpose built venues within easy reach has always been an attraction for travel. Therefore, state gambling regimes were always affected by the gambling regimes of their neighbouring states.

It will be established in the following sections that despite these extensive similarities in historical experiences, differences have emerged in the perception of gambling and the social acceptability of certain games.

### **3.2.1. Europe<sup>104</sup>**

There are evidences of European peoples' gambling habits since the ancient Roman and Greek times (Derevensky, 2009). An overview of the limited number of historical studies<sup>105</sup> on the subject reveals that gambling habits of Europeans not only survived centuries that had witnessed great changes in social, political, cultural and economic changes but also endless wars, changing borders and trade among them meant that these habits were transferred from one region to the other in constant flow, giving them a shared cultural heritage of games.

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<sup>104</sup> In this section Europe refers to the larger European area which now forms, roughly, the European Union and EFTA areas.

<sup>105</sup> Some examples are: *High Society - A Social History of the Regency Period 1788-1830* (Venetia, 1999), *Roll the Bones: the History of Gambling* (Schwartz, 2006), *Gambling and Speculation: A Theory, a History, and a Future of Some Human* (Brenner and Brenner, 1990), *Understanding Gambling: History, Concepts and Theories* (McMillen, 1996).

In ancient Greece, dice games, simple odds and evens games and betting (on sports contests) were very common gambling practices. Hence, numerous reliefs portraying common people and also gods playing dice were discovered among Greek ruins (Schwartz, 2006:7). Romans, like Greeks, also enjoyed gambling. There are specific references to gambling habits of Roman Emperors, Roman soldiers and plebs which included dice games and betting. Also among the ruins numerous gaming boards, tables and dice were discovered. One significant example is the group of dice players discovered among the ruins of Pompeii, still holding the dice in their fists. As a matter of fact, the roman laws restricted gambling but the enforcement was superficial (Schwartz, 2006:25-30).

In Europe, despite religious disapproval by both Christian and Jewish authorities and legal restrictions, gambling preserved its popularity in the middle-ages both in higher and lower classes of society (Reith, 1999:47). References to wide spread gambling activities can be found in literature. One example is the reference to Hazard, a dice game, in the Canterbury Tales (Chaucer, 1980-9), which was one of the most popular games of that time. The aristocrats of the time also enjoyed card games which were expensive to acquire. These games were played with either a regular playing deck or a full Tarot deck (Reith, 1999:49-52).

In Europe the period between 14<sup>th</sup> to 17<sup>th</sup> centuries is often characterised by the renaissance movement.<sup>106</sup> During the Renaissance period, gambling remained its presence throughout Europe and the popular games were more or less similar across societies. They spread from one region to the other by interaction through wars and trade. The games varied from board games such as checkers and backgammon, to dice games and card games. Most of these games were the initial versions of the games that are played today, including games based on chance such as poker, backgammon and craps<sup>107</sup> and games based on skill such as chess, and billiards (Leibz, 2004:87). The card games appeared in European history in second half the 14<sup>th</sup> century (Chatto, 1848:92) and the deck was standardized around the same time. However, it gained wide prominence after 1500 (Leibz, 2004:88).

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<sup>106</sup> A number of developments, including but not limited to the plague, the turmoil in the Catholic Church and therefore the decline of its authority over its people and conquest of Istanbul and immigration of Greek scientists to Italy triggered this movement in arts and science which in turn effected other areas such as politics and religion.

<sup>107</sup> In 1400s a dice game called hazard was later simplified and became craps that is still a popular dice game in the US. Encyclopaedia Britannica Available: <http://global.britannica.com/EBchecked/topic/241284/grand-hazard> [Accessed 12 August 2013].

Again in the 15<sup>th</sup> and 16<sup>th</sup> century, gambling was widely practiced around Europe<sup>108</sup> (Binde, June 2005). However, it was around 1650-1800, that the leisure activities including gambling's popularity exploded especially among the nobility and became visible evidenced by the increase on written accounts on such activities<sup>109</sup> and the paintings of the era (Burke, 1995).<sup>110</sup> The first casino type establishments where a variety of games were practiced under one roof appeared in this period *ridottos* in Venice were known as the first public casinos<sup>111</sup> (Schwartz, 2006:87). As the gambling industry became more commercialized, the gamblers enjoyed a vast expansion of gambling types and activities at various venues including casinos, spa towns, balls, races, social evenings and so on (Hörnle and Zammit, 2010: 6-8, Schwartz, 2006:447).

Especially the aristocrats of Europe spent vast amounts of their fortune at these venues. The spa at Baden-Baden now in modern-day Germany, was the most popular among these, attracting customers from England to Russia and from Scandinavia to the Mediterranean. An exhibition at the J. Paul Getty Museum in May 2011 displayed some items descriptive of the place of social gambling in the lives of French aristocrats. Gambling-related items occupied a large portion of the display. Accordingly in the 18th century gambling was a means of displaying wealth, an indication of social status. It facilitated social networking and storytelling. It was also considered an effective way to teach children math and strategy.<sup>112</sup> Gambling lifestyles are portrayed in many novels and books about those times, such as *Georgina, Duchess of Devonshire* (Foreman, 2001) but maybe most notoriously in *The Gambler* by Fyodor Dostoyevsky (1996).<sup>113</sup> The prior provides a description of the vibrant gambling scene in England while the other takes place in a spa town in Germany with international clientele hailing from Turkey, Russia, England and points in between.

The major evolution of the 19<sup>th</sup> century Europe<sup>114</sup> was due to industrialization which had started in England at around 1870 and spread across Europe until 1950s and revolutions

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<sup>108</sup> Per Binde exempts the Sa'mi people in the north. He also points out suspicion about the Balkans, probably because of the heavy influence of Islam in the area..

<sup>109</sup> These include dancing, drinking and smoking.

<sup>110</sup> Some examples are by Carravagio Michelangelo da Caravaggio, Georges La Tour, Frans Hals, Pieter de Hoogh, Adriaen van Ostade, David Teniers, or Jean Antoine Watteau, representing people smoking, drinking, dancing, playing backgammon, playing cards, dice, and so on. ,

<sup>111</sup> The segments of the society with lower income could not these premises due to high stakes and the dress code.

<sup>112</sup> Please see PORTNER, J. 2011. Paris Gamblers: Gaming in 18th-Century France. The Getty Museum Blog [Online]. Available from: <http://blogs.getty.edu/iris/2011/05/> [Accessed 15 November 2011].

<sup>113</sup> Some other examples are Richard (2011), Venetia (1999) and Brander (1973).

<sup>114</sup> Industrialization affected the western and central states of Europe (Davies, 1997:18).

which had started in France in 1789. During these times the social and economic structures underwent major changes. For example the economies of the industrialized states have started to foster, there was an extensive move from agriculture to services and industries of their labour forces<sup>115</sup> and therefore from rural areas to cities where working class met with the commercialized gambling market (Tilly, 2010).

The continuous presence of gambling throughout European history was accompanied by attempts at prohibition, restriction and regular condemnation. The 1800s was no different and a series of gambling prohibitions were also imposed in this period (Reith, 1999:85).<sup>116</sup> In line with the ideals prevalent at the time, the excessive gambling habits specifically casino style gambling had to cease in order to prevent financial disorder, especially in the cities that have become much more crowded after industrialization. It was prohibited in 1837 in France and spread across western Europe (Schwartz, 2006:184) Initially, the prohibition attempts were not very effective, gambling activities moved to spa resorts. However, in time all spa towns, including Baden Baden, also ceased operations. By the late 19<sup>th</sup> century most European nations had prohibited gambling. In England many professional gambling houses maintained a very vibrant gambling scene until 1845, when Parliament tightened sanctions. These moves in fact did not eradicate the existence of gambling venues, given that most moved their operations to private clubs. Despite official and public disapproval and scandals, gambling, especially betting, thrived in this period, with the participation of notable noblemen (Schwartz, 2006:185).

In the beginning of the 20<sup>th</sup> century, the success of Monte Carlo casino in Monaco inspired other French cities along its coast (Schwartz, 2006:121). This triggered Italian government to allow casinos offering roulette in San Remo. This wave of legalization continued among the European nations, mostly legitimized based on the need to raise money for underfunded projects. Unprecedented growth in the global gambling industry took place in the second half of the 20<sup>th</sup> century (Reith, 1999:88). Casinos began a revival, mainly in France, but especially after World War II, the European states chose to adopt strict licensing regimes and to benefit from the revenues generated by the industry, rather than to prohibit it. By the 1980s, every western European state had lotteries<sup>117</sup> and football betting, called Toto. In 1999, the

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<sup>115</sup> The proportion of the labor force that remained in agriculture differed from country to country. As such by 1840, about a quarter remained in agriculture, whereas in Germany and France it was about half of the labor force. (Tilly, 2010)

<sup>116</sup> France prohibited gambling 1837, Prussia in 1872 and the Switzerland in 1877.

<sup>117</sup> Luxembourg joined the others a few years later.



European State Lottery and Toto Association were established, primarily to facilitate communication among the organizers of lotteries and sports betting in Europe.<sup>118</sup> Several indications can be derived from the developments summarized above. Most importantly, the states had been unable to successfully sustain their prohibitionist regimes for extended periods. The existence of several gambling regimes at the same time in Europe and the willingness of citizens to travel to consume these gambling services were very important factors leading to this failure. Travelling consumers even extended the potential customer base by spreading popular games across borders. Another reason for the failure of prohibition was the attraction of the potential to gain quick revenues from gambling tourism in times of economic hardship. This lure led states to use provision of gambling services as a catalyst to revive their economies. For one reason or another, gambling was never completely eradicated in Europe.

In the second half of the 20<sup>th</sup> century, there was a dramatic change in the social conceptualization of gambling, evident in the widespread legalization of gambling services, mainly lotteries and sports betting. This issue is explored further in the next section.

The European history of gambling shows that similar political and economic changes have affected European countries in a chain effect and which were also reflected in attitudes towards gambling and the development of the gambling industry.

### **3.2.2. The USA**

The first permanent English settlement in North America Jamestown, Virginia, was financed by the revenues of a lottery organized in England by the company which was granted a charter to build a plantation and colonize the area. This lottery was organized specifically for this purpose, with the license granted by the Crown in 1612. King James I eventually prohibited such lotteries due to constant attack from critics (Findlay, 1986: 12-4). Later, all thirteen colonies established one or more lotteries to finance a wide range of public functions, such as construction of bridges, roads, churches and so on.<sup>119</sup> Purchasing lottery tickets was even considered a mark of patriotism at the time (Clotfelter and Cook, 1989: 34-5).

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<sup>118</sup> Mission, European State Lottery and Toto Association 2012 Available: <https://www.european-lotteries.org/association/mission.php> [Accessed 12 August 2012].

<sup>119</sup> Many prominent universities of today, including Harvard, Yale and Princeton were also established with the help of lottery revenues (Schwartz, 2006: 144)

During colonial times, attitudes towards gambling in the US reflected British customs (Lears, 2003: 38-54). Gambling was an everyday pastime. The games that were considered proper gentlemen's diversions were legal<sup>120</sup> and there was a degree of tolerance towards the illegal games (Dunstan, 1997). Horseracing, initially sponsored by the New York governor of the time, first appeared at the Newmarket track on Long Island in 1665.<sup>121</sup> In the beginning such gambling was limited in customer reach and spread slowly. Card games, dicing and betting were also common among settlers, usually in inns and taverns. Casino style organized gambling on the other hand, requiring more populated areas, appeared later.

As in Europe, the first large scale prohibition of gambling in the US started in the 1830s. In the US, it happened under the influence of the Second Great Awakening and the Jacksonian Democracy (Findlay, 1986:41-43). The movement targeted mainly the lotteries and to a lesser extent, card games. Horseracing, considered a gentleman's sport more than a form of gambling, was ignored (Simon, 2001:118-123).<sup>122</sup> The reach of this prohibition was limited and did not achieve the desired success. During this period Chicago and New York famously became underground gambling centres.

After the Civil War ended in 1865, gambling again became acceptable for about half a century until 1910, when there emerged a second attempt at prohibition, of both gambling and alcohol, as a relatively minor component of the larger political, economic and social reforms of the Progressive Era. Triggered by rapid industrialization and urbanization, this movement toward prohibition was much more effective than the previous one. Nevertheless, a survey conducted in 1944 showed that one quarter of the adult population had participated in a church raffle or lottery and seven percent had played policy or numbers games during this period. Taking other forms of gambling into consideration, over fifty percent of Americans had gambled in one form or another (Clotfelter and Cook, 1989: 134). According to Schwartz the prohibition only served the illegal operators and the politicians and police who gave them protection (Schwartz, 2006:342-3). In Europe, the prohibitory period that started in the mid 1800s continued without a break, as the Civil War in the US that triggered the attempt at legalization, was not as significant for European social and economic life.

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<sup>120</sup> One example is card games. It would take a long time for the others, such as cockfights, to be classified in the same category (Dunstan, 1997).

<sup>121</sup> Gambling in America: Final Report (1976) US Commission, on the Review of the National Policy Toward Gambling. Available:<http://hdl.handle.net/1880/41368> [Accessed 10 August 2013]

<sup>122</sup> In 1820s and 1830s, in Washington D.C. during the race weeks, the Senate many times lacked quorum for business (Findlay, 1986).

In the US, during and after the Great Depression, in the 1930s, public perception and the state's attitude toward gambling changed dramatically once again. The effects of the economic crisis were so severe that authorities sought any means to stimulate the economy. Most states embraced gambling, deciding to benefit from the industry rather than repress it. The expansion of the gambling industry exceeded all expectations both financially and geographically. As a result of the chain effect, by 2007, with the exception of Utah and Hawaii, all states had legalized some form of gambling and the size of the gambling industry had reached 93.8 billion dollars in revenue.<sup>123</sup> This fast and vast expansion raised issues of control and effective governance, albeit over a regulated industry rather than an underground one. However, in the US, as in the EU, lack of research and data makes it difficult to submit a good evaluation based on statistical information.

In the US, gambling is among the areas left for states to regulate. As can be observed from the brief historical account, it is possible to generalize permissive and prohibitory periods in the US given that most states, with few exceptions, have adopted relatively similar regimes within a short time period on their own initiative. Thus the domino effect between the states has been inevitable, with a few exceptions. However, the range of permitted activities and venues varies considerably. Gambling policies within the US can easily be described as pluralistic, ranging from strictly prohibitionist Utah to very liberal Nevada.

It is also true for the US that despite strong moral disapproval and several legislative attempts at prohibition, gambling was never completely eradicated and the supply of gambling services persisted. Even governments have resorted to the provision of gambling services as a quick way of generating revenues in times of economic hardship.

The widespread legalization of several types of gambling services in the US, as in the EU is also an indication of changing moral concerns regarding gambling and/or the transformation of the state's role from guardian of public and private morals to guardian of consumers in the public eye.

### **3.3. Gambling and Religion**

From a global perspective; the western world, led by the US and the EU, is generally held to be a group of states sharing a heritage of social norms, moral values, traditions, religious

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<sup>123</sup> American Gaming Association (AGA), Industry Information, April 2008, Available: <http://www.americangaming.org/Industry/factsheets/index.cfm> [Accessed 6 November 2008].

beliefs and political ideologies.<sup>124</sup> Despite noteworthy differences among and within them, these components present sufficiently significant similarities that one may refer to them as a group, whereas western culture is often differentiated from other cultural spheres, such as China and/or the Middle East. As a matter of fact, the west's liberal approach toward gambling services also reflects the commonalities of western culture and values. For example, gambling is strictly prohibited both in the Middle Eastern states and in China,<sup>125</sup> although both in the US<sup>126</sup> and the EU, one or more types of gambling services are legally permitted by the states, under licensing regimes and strict state controls. This section explores the roles of religious beliefs in the western liberal democracies, as exemplified by the US and the EU, in their current approach to gambling services. This discussion will be followed by an evaluation of the impact of moral values on those services.

In both regions, religious authorities have lost their once powerful and direct influence over the governments and the separation of religion and state has long been established. As modern democracies flourished firstly in the west, Christian authorities were the first to experience this fate. However, religion still remains an important component of the social order. Therefore, its influence on issues should be taken into consideration when analysing a concept in a society, especially when there are special references to it.

Gambling is not explicitly banned in Christianity, the predominant religious belief system in the US and in the EU. Under Catholicism, one of the most common forms of Christianity, the passion for games of chance risks becoming an enslavement and participation becomes unacceptable when gambling deprives a person of what is necessary to provide for his needs and those of others. The Vatican, the centre of Catholicism, also address unfair wagers and cheating. These are to be taken seriously, unless so minor that the sufferer does not consider the damage significant.<sup>127</sup> The Protestant denominations, in general, take a firmer stance against gambling, especially Methodists, Mormons, Southern Baptists and Lutherans. In general, these groups argue that the reliance on chance leads to the loss of control over one's own life; meanwhile gamblers undermine valuable resources and are likely to act selfishly (Clotfelter and Cook, 1989: 47). Such a stance gains strength given the continually arising examples of the tragic experiences of problem gamblers whose financial decline has led to

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<sup>124</sup> These ideologies are inclusive of adoption of liberal democracy, the rule of law, and human rights.

<sup>125</sup> Gambling is only allowed in Macau, one of the two special administrative regions of the People's Republic of China.

<sup>126</sup> In Utah and Hawaii all forms of gambling are prohibited.

<sup>127</sup> 'Cathethism of the Catholic Church, Part III Life in Christ' Vatican Church Available: [http://www.vatican.va/archive/ccc\\_css/archive/catechism/p3s2c2a7.htm](http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a7.htm) [Accessed 4 November 2011].

troubles with their health and their professional and family lives. Religious authorities continuously warn their communities of the harms of gambling and offer a true path and hope for those who have lost their way.

In fact, the relationship between religion and games of chance predates Christianity. Religious figures of ancient times are believed to be the inventors and/or initial players of games of chance. Archaeological evidence indicates that basic games of chance, such as odds and evens or throwing astragali—an ancient form of dice—existed in various parts of the world in ancient times. These games of chance were construed as games of magical skill conducted by religious authorities who were associated with supernatural powers. The randomized results of these games were believed to be messages from divine sources and were used to interpret past or future events<sup>128</sup> (Reith, 1999: 17). This relationship between spirituality and games of chance did not vanish easily. Many cultures believed in Gods or other supernatural figures that brought them luck when gambling, such as Hermes, the bringer of luck and patron of the Athenian lottery, the North American Coyote and the West Central African god Eshu (Lears, 2003: 10). Down through the centuries, interest in gambling persisted in all these regions, despite condemnation by such prevailing religions, as Protestantism, Buddhism and Islam. Kroeber and then Schwartz argued that people first decide whether to accept or disregard gambling and then adapt their ideas to their decision. Therefore, “gambling cannot be systematically correlated with lifestyle, ideas towards wealth or religion” (Kroeber, 1948, Schwartz, 2006:8).

Religious authorities’ motives for opposing gambling were seldom questioned throughout this time. However, in 1959, anthropologists Arth, Roberts and Bush introduced a perspective which has gained increasing support over the years. In their research on games, they found that games of chance appear to be exercises of relationships with the supernatural and are linked to the religious systems in a society (Arth, Roberts and Bush, 1959, Blanchard, 1995: 18-9). Recently, social anthropologist Per Binde has similarly argued that the strong links that existed between gambling and religion in ancient times continue today: “Gambling and religion go well together because there is common preoccupation with the unknown, the mystery, the fate, the destiny, the despair and the happiness of receiving something from higher powers and the hope for a transformed better life”.

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<sup>128</sup> Some of these rituals had other uses, such as casting the lots.

These commonalities allow for gambling and religious beliefs to exist in one person or in one society in harmony. On the other hand, the religions' monopoly claim over spiritual matters has been mentioned as the reason behind their lack of sympathy towards gambling. (Brenner and Brenner, 1990: 50, Reeve, 1987, Sutton-Smith, 2001: 67, Fuller, 1975, Binde, 2005)

In his book *Something for Nothing*, Lears extended this argument, claiming that there is a connection between churches and casinos as well as between gambling and grace. Accordingly, churches and casinos are the two places where people come to search for grace, a kind of spiritual luck, a free gift from god. Lears referred to Episcopal Reverend Jeffrey Black of Kansas City, Missouri, who also equated the gambling urge to a yearning for redemption: "The whole hope of human being is that somehow, in spite of the things I've done wrong, there will be an episode when grace and fate shower down on me and an unearned blessing will come to me – that I'll be the one (Lears, 2003:9)".

The results of a study conducted in 1978 verify Reverend Black's observation. Despite all our intellectual advances, about a third of the winners of the huge top prizes in American lotteries have expressed the belief that their winning was part of a divine plan (Kaplan, 1978: 9, 33, 42). It is noteworthy that in the age of reason, gambling wins are still explained by luck, faith or other types of divine or mystical forces (Schwartz, 2006).

In the following sections of this chapter in which gambling is defined as play, there is particular emphasis on the aspect of the separateness of gambling from the real world. Thus, if we find this theory credible, two more common features of gambling and religion emerge. First, both concepts provide players an alternative reality and let them escape the daily worries of life. Second, the gambler's disregard for worldly valuables in his search for grace resembles the spiritual fulfilment expected for devoted believers.

All these arguments suggest that gambling and religion may well be responding to similar needs of individuals and society, thus leading to competition. Whether under the motive to suppress a competitor or to save society from a dangerous vice, authorities of modern religions have almost always disapproved of gambling activities, and still do. As mentioned above, religious authorities are no longer directly influential over the state. However, they still have power over their followers. Elected members of governments who would not like to lose the support of these followers are particularly careful not to upset these authorities. One recent example occurred in February 2008 when the UK's Archbishop of Canterbury, Rowan Williams, commented on the human pollution caused by gambling and urged the Culture

Secretary to invoke a statutory levy on the industry to fund the treatment of problem gambling.<sup>129</sup> One week later the Responsibility in Gaming Trust, an influential and independent trust established in UK as a part of their gambling policy reforms, sent out letters complaining about the poor response from the majority of UK licensed operators regarding its funding requirements (Treanor, 2008). The two incidents were linked by the industry.

The relationship between religions and gambling is and has always been intense, whether in harmony or in conflict. The majority of Christian denominations have had reservations about the expansion of gambling, yet gambling has remained popular both in the US and in the EU. Therefore, the degree of tolerance towards gambling has not been an exact reflection of how the prevailing religions in the two units of analysis view gambling. As a reflection of their diminishing role, religious considerations are not cited as grounds for continued national control over gambling activities<sup>130</sup> in relevant case law.

As references to religion in law making is no longer appropriate in secular democracies, the assessment of the extent of the influence of prevalent religious authorities and the importance of spiritual matters in gambling related regulations and policies is not a straightforward matter. The explicit justifications set forward for restriction and regulation of gambling are reasons of consumer protection and prevention of social policy risks (Hörnle and Zammit, 2010:11)

### **3.4. Gambling and Morals**

The common perception is that the western world shares an understanding of morals influenced by ancient Roman and Hellenistic traditions followed by the influence of Christianity and later by the Renaissance and Reformation. As mentioned above, significant local differences have existed among and within the various political divisions of the western countries. However, all the states in both subject areas have adopted liberal democratic regimes and liberal economic systems. These two factors smooth the progress of communication among the western states and have a considerable influence over how religious and moral values influence policy decisions.

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<sup>129</sup> Please see WILLIAMS, R. 2008. The Archbishop's Speech on Gambling, at the General Synod [Online]. Available: <http://www.archbishopofcanterbury.org/1588> [Accessed 9 March 2009].

<sup>130</sup> However religious values do impact moral values and moral values have been primary grounds for preservation of national control. Also, because gambling is not specifically prohibited in the Bible, the Churches have very often strengthened their anti-gambling argument on moral grounds.

Currently, the prevailing western moral approach to the subject of gambling is that gambling is wrong and harmful to the gambler only if he or she does it in excess. The “citizens of a liberal democracy are to govern themselves”<sup>131</sup> and the state’s role no longer includes imposition of a strict code to protect its citizens’ individual morals. Therefore, in this type of governance, the links between laws and morals have been weakened (Cotterrell, 1992: 45).<sup>132</sup> The state no longer prohibits or restricts gambling because it is morally wrong for the participant but regulates it to put in place measures to ensure consumer protection for those willing to participate and to prevent exploitation of the vulnerable. In accordance with this new role, the states have employed strict control regimes to monitor the activities of service providers and to avoid exploitation of those gambling in an excessive manner that may lead to their financial and social ruin and/or to psychological disorders. The increased coverage of excessive gambling as a psychological disorder is very recent,<sup>133</sup> and the tendency to recognize of a wider range of human conditions as psychological problems has been linked to the states’ willingness to govern their activities (Collins, 1996). In any scenario, as observed in the experiences of both the EU and the US, changes in gambling legislation reflect not only changing attitudes towards gambling but also the society’s perception of the government’s role in social life.

Even if one accepts that the “western states” no longer impose a moral code on the individual, public morals are still an important factor in policy making and in social life. Moral arguments are typically supported by reasons related to various segments of society. In the case of gambling, these reasons can be grouped into three categories. The first points out to the element of chance being the determinant factor for distribution of reward. Gambling is inconsistent with a social order in which reward is promised to the hardworking and/or successful (Downes et al., 2006: 101-120). The second category emphasizes the exploitation of the people with weaker characters. The consequences of their spending exceeding their means usually bear results not only for themselves but also for their families and friends. The third category alleges an association of gambling with law-breaking, organized crime and political corruption (Eadington, 1996).

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<sup>131</sup> Nikolas Rose referred to *The Pathological Gambler and the Government of Gambling* by A.F. Collins (1996: 69-100)

<sup>132</sup> This view is contested as well. In relation to the inseparability of law from morals Cotterrell often refers to prominent legal sociologist Emile Durkheim’s strong views on the issue. (Cotterrell, 1992: 96)

<sup>133</sup> This view gained wider recognition in the 1980s.



The last two bases for moral disapproval have been central to gambling policies in the current legalization wave of both the US and the EU as these entities also provide appropriate scope for the state's role in protecting consumers, the vulnerable and the social order. Hence, the operations of the gambling industry have come under increased levels of control as compared to other leisure industries. Also, the gambling industry has been required to fund public and charitable purposes and organizations that provide support for problem gambling groups to minimize problems caused by addiction in addition to various other measures that set in place to keep problem gamblers and other vulnerable groups from reaching gambling venues.<sup>134</sup> All these measures have helped to improve the reputation of the gambling industry evidenced by the tolerance towards the establishment and organization of increasing numbers of licensed gambling activities and increasing numbers of participants in the US and the EU (Cosgrave, 2006:10, Magder, 2006).

### **3.5. Gambling as Leisure**

#### **3.5.1. A Theoretical Perspective**

Under contemporary approaches, leisure activities have begun to receive acceptance as a fundamental component of social life. Although this change has been contrary to the ideals of capitalism, wider crowds acknowledge the importance and benefits of spending time in recreation. This attitude towards leisure activities has become an important factor in the shift in perception of gambling from vice to recreation, providing a foundation for its persistent popularity among the populations of the EU and the US and justifying the states' ongoing resort to gambling revenues, such as lotteries, in times of economic hardship. In reflection of these changing attitudes, in the majority of the EU and US states, gambling is regulated as a leisure activity.

Leisure is generally described as a period of time spent voluntarily on something that is intrinsically motivating on its own merit, other than work or essential domestic activity (Neulinger, 1974). Play is a form of leisure and the theories that support the idea that gambling is a leisure activity have been based on or inspired by the idea that gambling is play. Huizinga was the first to raise this argument in his book *Homo Ludens* (1950), to be joined by Caillois (2001). A hybrid definition, derived from their work, will be that play is a range of voluntary, superfluous, intrinsically motivated, unproductive, make-believe and/or

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<sup>134</sup> However, the endless need for further public funds and charitable purposes has undermined the primary motive to restrict the range and amount of gambling services offered by leading to its expansion. This has been pointed out as an inconsistency in gambling (Hörnle and Zammit, 2010:10-1)

regulated activities that absorb the player intensely and utterly. It is limited to a certain time and place, has an uncertain ending and is normally associated with pleasure and enjoyment. Huizinga has defined gambling only for pleasure, as play. According to him, gambling on a continuous basis for generating income is work. In the case of a compulsive or obsessive gambler, gambling is not play at all, since an emotional and psychological necessity cannot be voluntary and spontaneous, as play should be (Abt, Smith and Christiansen, 1985:37). His views of gambling as work and as a problem have received wider acceptance and neither Caillois nor other successors of this thought have challenged that view<sup>135</sup> (Downes et al., 2006, Caillois, 2001:6).

One aspect of play, that is the separateness from daily life, has inspired a range of thoughts and theories. It is argued that, when gambling, players enter a separate realm, and the rules, goals and values of everyday life are altered. Many gamblers have also reported that they become so concentrated on the game in front of them that they disassociate from the real world (Reith, 2006). In that state they become a different personality, strangers to themselves. They do not care about their daily routines or worries during that period. One prominent sociologist Erving Goffman described that stage as "... a world in itself different from all other worlds" (1961a: 26).

Regarding this separateness from everyday life, Simmel (2006), pointed out the resemblances between the gambling experience and adventure. Benjamin (2006) and Goffman (2006) argued that gambling is a (social) action (Cosgrave, 2006). In his very extensive work about gambling, Devereux argued that gambling is a means to relieve the strain in a socially acceptable manner, even if it is not always legal (Frey, 1984, Devereux, 1949: 696). Lears has similarly argued that, gambling is an important component of social life especially in

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<sup>135</sup> Indeed, the characteristics of play are helpful in describing gambling. It is voluntary; there is no obligation or need to gamble. Such is not true for compulsive gamblers; Huizinga, also, excluded such gamblers from his definition. It is superfluous; one may never gamble in his entire life and never feel the absence of it or one may simply stop gambling and fill that time gap with something else. It is intrinsically motivated; there are simply people who find pleasure in gambling and there are people who have no interest in it. It is unproductive; the exchange of valuables during or at the end of the game is not a productive result. It is regulated; every game of chance has its own rules and the players are expected to obey them strictly. In the gambling world cheating is not tolerated and the rules are not flexible. Gambling has an uncertain ending, a primary reason for the excitement of the game. The player does not know if he will reach the desired end. It is this uncertainty that absorbs players in the game intensely and utterly. Games are limited to a certain time and place. Gambling games start and end in a given period of time, allowing for repetition. Finally, all types of gambling occur at different venues. Card games, horse racing, lotteries, slot machines are all played using different sets of equipment and in different settings.

capitalist societies given that it allows an escape from the controlling and limiting aspects of the system.(Lears, 2003: 6, 326)

These theories can all be considered under the umbrella concept “gambling as leisure”. They promoted a view of gambling beyond prevalent negative prejudices and provided an explanation for the increasing demand of a larger percentage of the population able to gamble for leisure without causing problem to themselves, their families or the societies they live in. This approach has also provided a more appropriate mindset for states to regulate gambling, by not only focusing on eliminating the negative consequences of gambling but also evaluating, maintaining and benefiting from its possible positive social and economic functions.

The path from prohibition to regulation in parallel with transformation of gambling from vice to leisure was a significant turning point. However, not all types of gambling benefited from this transformation. Government policies and regulations have often differed from one type of gambling to the other and also from region to region. As can be observed in the sections where historical facts are provided as per each subject region<sup>136</sup>, two of the primary reasons behind the differential treatment are historical experiences and cultural differences. For example, lotteries and especially betting is heavily restricted in most US States, whereas in Europe these two are the most commonly practiced. The opposite is true for casino games which are practiced at a much higher level in the US compared to the EU.

The lawmakers have also adopted objective criteria justifying their policies and consequently the level and type of restrictions placed on certain types of gambling. The most commonly adopted classification is based on the element of chance. (Hörnle and Zammit, 2010) Accordingly, games the outcome of which is dependent on skill alone, such as chess, are not considered gambling and are allowed in both regions. The regulatory transformation was mostly reflected in regulations regarding the games where the outcome is purely dependent on chance, such as roulette or slot machines and also the games where the outcome is dependent on both chance and skill, such as poker and backgammon<sup>137</sup>. As expected the provision of these games had been regulated subjected to increased control mechanisms compared to other leisure activities. Nevertheless, the development of the regulatory

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<sup>136</sup> Please see Section 3.2.

<sup>137</sup> In some jurisdictions the mere existence of chance element is enough to qualify a game as gambling. For further information please see section 3.2.1.

approaches is in itself a proof of the changing perception of gambling and changes in the goals of the government policies.

### **3.5.1.1. Stake as a Consideration for Leisure Services Provided**

The fact that people continue to gamble, despite knowing that the winning odds are very slim, makes more sense if it is accepted that stake is merely a medium of gambling, which is play, a leisure activity and the prize is the award for winning that game<sup>138</sup>. This observation is not completely new. In the UK, in the 1950s, the staked amounts were perceived as a part of individuals' entertainment budgets. The Social and Industrial Commission of the Church Assembly of the UK had in its report regarding ethical considerations surrounding gambling recognized that the stake could be deemed as a consideration for the gambling services provided (Hudson, 1950:22). The 1951 Report of the Royal Commission on Betting, Lotteries and Gaming also recognized gambling as a legitimate service and expressed a similar view (Mitchell, 1951). This view has since gained wider acceptance, indicating that the gamblers are receiving a service in return for their payment even when they lose.

The striking outcome of this view is that gamblers disregard the money or other material medium they use for gambling. This view offers a resistance to the expected patterns of expenditure and consumption (Allen, 2006) and is exactly opposite the aims of a capitalistic economy. This opposition may explain the rapid commercialization of the gambling industry by the capitalistic systems. In that way gambling is made part of the capitalistic system, and its existence justified under an economic rationale.

Indeed, there is a difference between the goal of the game, winning, and the expectations of the players for participation in gambling activities. For every player different aspects of gambling make it attractive, such as socializing, thrill seeking and the exercise of skill. If the main purpose of participation is socializing, the stakes lost in gambling are deemed a cost of membership in that social group (Allen, 2006). For example, in interviews, horse bettors

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<sup>138</sup> In their interpretation of Homo Ludens Abt, Smith and Christiansen have concluded that in gambling, the gambler has pleasure in the action, the excitement and the escape, whether it is played for money or not. The money is only the medium of gambling, not the meaning. Gambling, just like other games, is an end in itself (1985: 38, 39) Reith added that the money is only a "medium through which participants register involvement in a game" and that in modern gambling it is a symbol for participation and an instrument for communication (1999: 146). According to Goffman the purpose behind the use of the stake is to enable correct seriousness in the attitude of the players towards the game (Downes et al., 2006, Goffman, 1961b). As a matter of fact, recent research has shown that most gamblers are indifferent to the possibility of winning as opposed to losing. According to Benjamin, for the gamblers, the danger and risk in gambling are not winning as oppose to losing. The gambler is threatened by acting too late, missing the opportunity of betting on the right number (2006). This being the case, Reith confirmed that the aim of the gamblers is simply to experience the excitement of the game and their primary hope is the indefinite continuation of play (1999: 144).

reported regarding themselves as an elite group in comparison to other bettors (Garfinkel, 1967, Allen, 2006). Another good example is bingo halls. Bingo halls, which serve as places for social interaction and as an escape from daily routine, especially for women (Maclure et al., 2006). As for the thrill seeking aspect of gambling, it has been said that the period between wagering and receiving the news of the outcome is the height of the thrill of the game and that participants seek to experience that thrill again and again. It has been observed that most professional poker players define limited stake games as being too mechanical and too much hard work, preferring the no-limit games. Two time world poker series winner Jack Straus has famously said that “If there is no risk of losing, there is no high in winning”, summing up the essence of the game and the meaning of the stake for himself (Lears, 2003: 327). In another example, Lotto players in New Zealand, interviewed for a study described their weekly activity as fun and entertaining. They did not have complete knowledge of the odds; once they were informed of them, they saw no reason to change their habit (Howland, 2001). Exercise of skill, on the other hand, should not be understood strictly in terms of the rules of the game. The exercise of skill covers the entire range of the activities. It could be more a feeling than actual demonstration of skill, such as having a perception of decision-making when choosing the right number in roulette; deciding when to raise the stake or when to stop; performing certain rituals in time, such as having one’s lucky charms in place; or applying social skills, as when reading other players. Such skills belong to the unique world of gambling are a part of the experience. Thus, the stake becomes the consideration paid for this experience.

For example, in paragraph 19 of *Schindler* in its classification of lotteries as economic activities, the ECJ disregarded the existence of the chance element, their recreational character and the fact that they were operated by public authorities for the public interest and decided based on the fact that these services were provided for remuneration. Therefore, the ECJ concluded that lotteries are economic activities within the meaning of the TEU and therefore do not fall outside its scope.

### **3.5.2. An alternative perspective: Risk Society**

The relationship between the rapid spread and legitimization of commercial gambling had also been analysed within the framework of the “risk society” theory.<sup>139</sup> Two prominent

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<sup>139</sup> For a collection of articles by prominent sociologists in the area, please see *The Sociology of Risk and Gambling Reader*, edited by James F. Cosgrave (Cosgrave, 2006), *Also Against the Gods*, *The Remarkable*

sociologists Ulrich Beck and Anthony Giddens have produced the initial key works on this theory<sup>140</sup> which is based on the argument that risk-taking and risk management in daily life are defining elements of post-industrial life style (Beck, 1992, Cosgrave, 2006). The present era of the western society is, then, dubbed as the “risk society”, whereas gambling is placed in this setting as an *institutionalized* form of risk and chance (Beck, 2006). This analysis provides an alternative perspective from a sociological lens that complements some shortcomings of other perspectives that focus on gambling as leisure and the socio-historical and economic grounds that justify it.

In his book *The Politics of Risk Society*, Giddens defines risk society as “a society where we increasingly live on a high technological frontier which absolutely no one completely understands and which generates a diversity of possible futures (Giddens, 1997:25)”. Giddens points out that this theory does not suggest that the world has become more hazardous as a consequence of modernity. However, the types of hazards that have become imminent due to advancements in science and technology are the ones that the society has become increasingly concerned with. The risk, as Beck puts it, is “the systematic way of dealing with these hazards and insecurities introduced by modernity itself (Beck, 1992:21)”. Within this framework risk management is the society’s response to the increased exposure of their daily lives to manufactured risks and knowledge of the same. (Giddens, 2006, Beck, 2006).

For the participant gambling becomes a form of voluntary risk taking, therefore an escape from routine, a response to rationalization, safety and risk-management. (Cosgrave, 2006: 4, Downes et al., 2006, Allen, 2006). Thus, the participants are considered to have assumed the risks associated with gambling and are expected to gamble responsibly (Lupton, 2006, Collins, 2006, Cosgrave, June 2008). This in turn had the effect of shifting the scope of gambling regulations, in terms of states responsibility towards its citizens. For example, the states’ approach and solutions it offers to gambling addiction is no longer constructed in a moral framework but in medical, consumerist and economic terms (Collins, 2006). Therefore, gambling regulations of liberalized markets uphold individual choice; however risk assessments, mainly in relation to addiction and crime, are important features of these regulations (Kingma, 2008).

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Story of Risk by Peter L. Bernstein is another significant work in relation to the role of risk in the society examined in relation to gambling.

140 Risk Society: Towards a New Modernity (Beck, 1992) and The Consequences of Modernity (Giddens, 1991)

The analysis under the risk society theory extends to the development of gambling enterprises through legalization, rationalization, commercialization and institutionalization of the gambling industry and the states' involvement as the promoter and/or the beneficiary, whether directly as the owner or operator or via tax benefits (Cosgrave, 2006). These analyses point out to the states' increased dependence on gambling revenues and the risks that the risks that the expansion of gambling activities may pose to the well-being of the society (Neary and Taylor, 2006, Allen, 2006, Nibert, 2006). Indeed, most gambling regulations are targeted to prevent and/ or manage social policy risks, associated with gambling such as addiction, protection of minors, consumer protection and prevention of fraud, crime and money laundering (Hörnle and Zammit, 2010, pg. 23). Uncontrolled expansion of the market poses the risk of undermining these social policy objectives.

There are comparative analyses of the risks associated with gambling activities and the relevant state policies to those of speculation in stock market and the insurance industry<sup>141</sup> pursuant to the risk society perspective (Miers, 2004).<sup>142</sup> This approach is based on the assumption that both in insurance and speculation in stock market, just as in gambling, the investors risk a certain amount of money on an uncertain outcome, with the hope of gaining more than the invested amount (Hurt, 2006).<sup>143</sup> As The regulations regarding insurance and stock market sectors usually tolerate the risk-taking aspect to be downplayed by presentation of them as activities of investment (Cosgrave, 2006). Especially the speculative investments in stock market resemble gambling greatly, in terms of productivity, social costs, rationality of choice making and trader behaviour (Zinn, 2008, Cosgrave, 2006, Hurt, 2006).<sup>144</sup>

The connection between studies of risk and studies of chance is not new. Today, it is widely known that chance is an important feature of modern science and as explained in probability theory, quantum mechanics and chaos theory (Reith, 1999:13-25). Remarkably, it was gambling that inspired the origination of probability theory in the mid 17<sup>th</sup> century. Cardano,

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<sup>141</sup> Particularly private pensions, annuities, and life insurance (Baker and Simon, 2002a:4).

<sup>142</sup> For further examples of insurance and risk society related publications please see: (Neary and Taylor, 2006, Cosgrave, 2006, Goffman, 2006, Baker and Simon, 2002b, Bernstein, 1998). For further examples of stock market and risk society related publications please see: (Bernstein, 1998, Cosgrave, 2006, Allen, 2006)

<sup>143</sup> The primary difference between gambling and insurance is that; in gambling unless the parties decide to gamble nothing is at risk, whereas in insurance the subject of the insurance is always at risk whether an insurance contract is entered into. The main difference with speculative stock market investments is pointed out as gambling resembles more to consumption than investment because the larger group of gamblers (not individually) always loose in the longer period. (Miers, 2004:7).

<sup>144</sup> The investor decision making process and strategies also involve strategies that are not completely rational such as: emotion, trust and intuition.

Galileo and finally Pascal all, initially, addressed the topic in order to find answers to gambling-related questions (Bernstein, 1998:57-58). Around the same time the probabilistic worldview was on the rise, Europe had entered a period of mercantile capitalism (Reith, 1999:26). Thus, the formulation of laws of chance was inspired by gambling but the subsequent development of the discipline benefited from dramatic changes in economic life. Knowledge of probability was interpreted as though all occurrences in the world had a reason and if one could not foresee the possible outcomes, it was due to lack of knowledge of the probabilities. The study of statistics in the UK and the notion of risk in France also emerged around the same time. Statistics were initially deemed to reflect certainty, and risk initially referred only to the potential hazard of commercial loss of insured goods.

Throughout the 19<sup>th</sup> century the groundbreaking preliminary discoveries about chance, probability, statistics and risk had faded, and studies on these subjects became much more advanced. By the 20<sup>th</sup> century all four concepts were understood, more or less, in their contemporary sense. Accordingly, chance became more than a lack of knowledge of probability. The demise of determinism and the philosophical proposition that every event, including human cognition and behaviour, decision and action, is causally determined by an unbroken chain of prior occurrences, also led to the acceptance of chance as an independent phenomenon (Reith, 1999:32-38). Risk today represents the undesirable results of a given situation and risk society theory refers to the period after industrialization in western societies in general. Studies related to risk aim to evaluate accessible information and to apply known measurement methods to predict possible future outcomes. The known measurement methods used to assess risk are based on modern statistics and probability methods. However, with all the information available it is still not possible to predict the future with certainty, crediting the existence of chance and the attraction of games of chance.

### **3.6.The significance of the diversity of social and moral values**

The previous sections have provided examples of the commonalities among the EU and the US in terms of the relationship between gambling and religion, morals and other aspects of social life. The parallels in these two regions are reflected not only in the changing role of the state in regulating areas of religious and moral concern but also in the changes in the public perception of gambling, its role in social lives and its perceived dangers. Since the provision of gambling services became subject to cross-border trade, interactions among states whether



in the form of conflict or cooperation, are mostly based on differences in associated public morals and resultant public policies of the states.

Differences among moral values of states have been acknowledged as a legitimate reason for derogation from their trade liberalization commitments and/or as a justification of national regulation that would otherwise be a breach of the same, in the context of treaties governing both the WTO and the EU. The courts do not require a detailed explanation of the moral values associated with gambling or analyse whether these differ among trading partners. Once an issue is accepted to be of moral concern, there is a universal acknowledgement that each state inherently has the right to regulate sectors that concern its moral values and to adopt the level of measures it deems appropriate for its protection.<sup>145</sup> The intention is to avoid the imposition of one state's values on another based on economic principles formulated to advance trade. As gambling has long been closely associated with morals, WTO and EU courts have acknowledged their member states' right to regulate.<sup>146</sup>

The acknowledgement of member states' right to regulate areas of moral concern is necessary to facilitate membership of the states in these trade organizations. In addition, the brief historical analysis in this chapter shows that despite significant similarities in the moral and social fabric of the states of the US and within the EU, probably due to continuous and multilevel interactions among them, each state adopts changes in its own time and enjoys the sovereign power to resist these changes, even if such resistance is rare. Trade liberalization objectives alone will not suffice to justify supranational intervention into these areas and the forcing of one type of public morals on all.

### **3.7. Cross-border gambling trade as a leisure service item**

The discussion topics surrounding gambling in the US and the EU have changed considerably since the 1890s. The debate previously centred on gambling's destructive consequences on the morals of the citizens, the morals and the order of the society as a whole and the criminal elements commonly associated with gambling. However, with the increasing recognition of gambling services as a leisure activity and a legitimate market, economic and consumer protection related concerns gradually, although not completely, replaced many former concerns, specifically those concerning the state's responsibility in protecting the morals of individuals (Collins, 2006). Strict state controls have been accepted as the most appropriate

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<sup>145</sup> Please see paragraph 222 of Appellate Body Report in *China - Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R.

<sup>146</sup> Please see Sections 4.6.3.5, 5.5.1. and 5.7.

and effective way of securing these consumer protections and in both the US and the EU the gambling industries were subjected to such control regimes and were sometimes directly operated by the states themselves. This long-standing tradition of extensive state control faced a major challenge with the emergence of gambling services as a cross-border trade item<sup>147</sup> in the last decades, mainly via the medium of the Internet. This development brought the fading morals argument back to gambling related discussions, this time only with reference to moral values of the societies,<sup>148</sup> in an effort to establish the legitimacy of differences between the domestic gambling policies of nations. The transformation of the conceptualization of the gambling services from a social ill and a moral deviance to a legitimate services sector and the social policy concerns accompanying this change are explained in this chapter in relation to the role of this change in the development of an international market and the ensuing challenges to traditional state controls.

The moral aspect of gambling services constitutes a clear and well-established justification for continued state control over the provision of gambling services. However, gambling services present a dual character. Although provision and participation continue to be morally questionable, gambling is a very lucrative economic item of the leisure services sector that has begun to be provided by legitimate business enterprises licensed by states and that is sometimes directly provided by the states themselves. The significant economic benefits arouse suspicions as to whether morals have been used to disguise restrictive state regimes in order to protect the revenues generated by this sector. In order to avoid this sort of exploitation of treaty based exceptions and derogations clauses, the treaties also allow assessment of the subject-restrictive legislation to discern whether it actually reflects the stated concerns.<sup>149</sup> Therefore, the qualities that have led gambling to become a legitimate business sector within the broader understanding of leisure services have also opened the door for cross-border trade. As a consequence of gambling being acknowledged as a leisure sector, the online service providers reasoned that they should have the right to conduct business across borders, despite conflicting national regimes at the receiving end.

The cross-border provision also led to consideration of the possibility of cooperation among the states most affected. The topics of interest included the risks most commonly associated

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<sup>147</sup> Throughout this dissertation “online media” will refer to all forms of digital information communication technologies, including but not limited to mobile technologies and some broadcasting technologies.

<sup>148</sup> That is rather than the moral values of their individual citizens as well.

<sup>149</sup> The analysis of the ECJ is much more detailed compared to that of the DSB of the WTO. For further details on this comparison please refer to Section 6.2.4.

with online gambling. These social policy concerns include addiction, protection of minors, consumer protection and prevention of fraud, crime and money laundering (Hörnle and Zammit, 2010:10-23). These concerns are not specific to online gambling, but relate to gambling services in general, which were believed to have been addressed via strict state controls.<sup>150</sup> The differences generally lie in the states' priorities and the level of protection they deem appropriate, as well as which games they deem more dangerous than others.

### **3.8.Conclusion**

This chapter explored, very briefly, the religious and moral perceptions of gambling in the US and the EU. Also, the historical perspective has provided not only an account of the interaction of legislative movements with previous economic cycles, governance systems and ideological movements but also with the interaction among the states. Within this framework, the acknowledgement of gambling activities as a leisure activity in the social lives of the people of the US and the EU had been linked to the liberal democratic governance system of those regions. The experiences and public perceptions related to gambling presented to this point show significant parallels between the regions.

The latest development, the emergence of the Internet and its use as a medium for providing gambling services across borders, has occasioned two changes. First, the moral aspect of gambling has once again come to the centre of gambling-related arguments in the form of a state's right to regulate its areas of moral concern as a member of a supranational or an international trade organization. Secondly, the differences among the gambling regimes of the states have become a focus of divergence-related discussions, primarily as regards the level of protection and the regulatory standards adopted by each state.

This chapter finds there are great commonalities among the EU and the US from a sociological and historical perspective. However, they are not sufficient to overcome the apparent moral particularities and regulatory divergences at national level that necessitate acknowledgement a state's inherent right to regulate any area closely linked to its moral values.

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<sup>150</sup> The goals of the regulatory systems have been divided into two groups. The first group concerns the integrity of the service providers and their operations while the second group concerns the control mechanisms that regulate participation of the players. The most common ways of achieving supplier control is via market entry controls: limiting the number of suppliers, setting requirements for financial, managerial and administrative structures; and implementing management controls, such as standard setting, inspection and testing of equipments and employees. Some examples for the second group are access related controls, game related controls and environment related controls. For detailed information please see Miers (1996).

## 4. International Law

### 4.1. Introduction

Gambling services had been largely ignored as an item of cross-border trade on the international platform until developments in ICTs led to the formation of a global online gambling market in the mid 1990s. In the same manner, the public morals clause remained dormant and undefined in international trade for almost 60 years<sup>151</sup> until 2004, the year that the cross-border provision of online gambling services became the subject of a high profile dispute: *US-Gambling* (Wu, 2008). The significance of this dispute was that it was not only the first but also probably the most publicized example of the increasing instances of trade liberalization and public morals appearing, “in a position of opposition (Delimatsis, 2010: 2)”. In this dispute the primary challenge for the WTO judicial bodies was to assess correctly whether public morals exception was being used to disguise restrictive measures or was being legitimately claimed. The significance of this differentiation is that the risk of systematic failure in the assessments of similar disputes would undermine the purpose of establishing the WTO trade system: promotion and advancement of trade liberalization.

This chapter primarily treats *US-Gambling*<sup>152</sup> as a case study to observe whether the WTO judicial process has been effective in protecting primary treaty objectives, in the light of the inevitable public morals divergences, indeterminacy of the morals concept and possible exploitation of the morals exception. The subject ruling was the first example for such disputes and sheds light on judicial interpretation of the relevant provisions and the applicable review mechanisms. These in turn reveal WTO’s perspective on the limits of state autonomy in regulating areas where national control is considered essential to maintain public order and to protect public morals, but which are otherwise subjects of international trade. Therefore, this decision, although significant for a variety of reasons, will be analysed .

The WTO is granted with a most extensive regulatory capacity in the services area, representing almost 95% of world trade.<sup>153</sup> The issue of cross-border provision of online gambling services came up at the WTO in the form of a dispute among two members: Antigua challenged the US’s restrictions on provision of online gambling services before the DSB, with reference to its obligations under GATS (*US-Gambling*). The analysis of this dispute and its implications provides a comprehensive coverage of the international trade law

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<sup>151</sup> The public morals clause existed in the original GATT Agreement which entered into force in 1947.

<sup>152</sup> There is also mention of *China-Publications and Audiovisual Products*.

<sup>153</sup> That is as of 2007 (Fergusson, 2007).

dimension of the cross-border provision of online gambling services, as it is the only example. The analysis acknowledges that WTO's stance as the most widespread and powerful trade organisation had been weakened by an increasing number of bilateral trade agreements and that its members had been disheartened about as to its future prospects due to the, so far, disappointing outcome of the negotiations at Doha Round. However, the strength of the arguments presented herein are not weakened in that regard as they are based not on the WTO's presumed power, but solely on the actual account of interactions among the actors.

The first section of this chapter provides essential background information for the analysis. Initially, the global online gambling market will be briefly introduced. This information will provide insight into the economical importance of this case. That discussion is followed by an introduction to the US federal legislation that restricts the cross-border provision of gambling services. Lastly, relevant GATS principles are presented. These informative sections are crucial in understanding the analysis of *US-Gambling*, the dispute constituting the main subject of analysis of this chapter.

The second section of this chapter provides the timeline for the *US-Gambling* dispute. The details of Antigua's claim against the US and both the Panel's and the Appellate Body's rulings on the case are introduced. There follows an account of the events regarding the implementation of the rulings. The goal of this section is to provide an account of the incident that initiated the webs of dialogue<sup>154</sup> among the major actors on an international level. The third section provides information on the coverage of the online gambling services topic under other International trade treaties. The fourth section offers conclusions.

#### **4.2.Economic Figures for Online Gambling in the International Gambling Trade**

In the national sphere, the public order- and public morals-related concerns of states regarding gambling have always been highly publicized and are therefore well known among the public. On the other hand, the economic benefits of local gambling industries have always been less publicized. Hesitance to do so is based on political concerns given the necessity of keeping public morals and public order from being undermined by economic concerns in the determination of gambling policies. Accordingly, any economic benefits derived as a result of government policies should, as a rule, be incidental. It is possible, however, to find various internal economic projects devised to revive the economies of underprivileged areas via

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<sup>154</sup> This term is used with reference to Global Business Regulation by Braithwaite and Drahos (2008:553).

establishment of gambling facilities. In most cases, these projects are specifically formulated to provide maximum benefit to the subject areas in terms of employment and taxes, are under strict control regimes, and are not typical liberalization schemes. However, in such circumstances it has not been possible to overcome controversy regarding the overall impact of these sorts of projects.

In the international trade area as well, the economic motivations of the states' gambling policies have been a topic that remains behind the scenes. This silence is not due purely to the internal political concerns of policymakers, though these are quite influential; it is subject to practical motivations as well. Among these the most important is that international tribunals do not consider economic reasons legitimate justification for placing restrictions on trade liberalization. Therefore, the states refrain from referring to economic justifications. As a result, the economic realities of the gambling industry remain a topic discussed much less than the actual impact it has on gambling policy decisions, globally and in the US.

The exceptions to this state of affairs are states with very liberal regimes, such as island states like Antigua-Barbuda, Malta, Alderney and so on.<sup>155</sup> In these states the economic benefits generated by the gambling industries are very much advertised. The most common reason for this difference is that these states usually have very small populations and very limited resources for generating income. Therefore, they lack the luxury of being conservative in the variety of industries they approve of. Also, their gambling-based economic schemes are usually targeted to attract foreign investment or tourism in a controlled environment rather than to meet the gambling demand of their own populations. In addition to this group, other states, including Australia, Costa Rica and the Netherlands Antilles, have adopted permissive regimes for online gambling but have prohibited provision of those services to their own citizens(Diaconu, 2010:34-7).<sup>156</sup>

Starting in 1995, online gambling sites offering online betting, casinos, poker and so on opened one after another. By 2004, the online gambling industry was worth 7 to 10 billion US Dollars, about half of that amount or more coming from the US. According to, H2 Gambling Capital, a widely quoted source of Internet gambling statistics, in 2010, the worth of the global Internet gambling industry was 29.95 billion US Dollars. Despite the legislative

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<sup>155</sup> There are of course rare examples of other states with more diverse economies which have adopted liberal regimes. The most prominent example is the UK.

<sup>156</sup> Sometimes the citizens of other states have been specifically prohibited Internet gambling, as in Australia (Nettleton, 2008:507-622).

speed bumps imposed by states from all around the world, the growth of the industry was unstoppable. Still, the land based gambling industry remained strong retaining 91.4% of the overall revenues of the gambling industry in 2010 estimated at around 335 billion US Dollars. The table below provides a recent picture of the global interest in Internet gambling, showing a breakdown of global Internet gambling gross wins by region for 2011:<sup>157</sup>

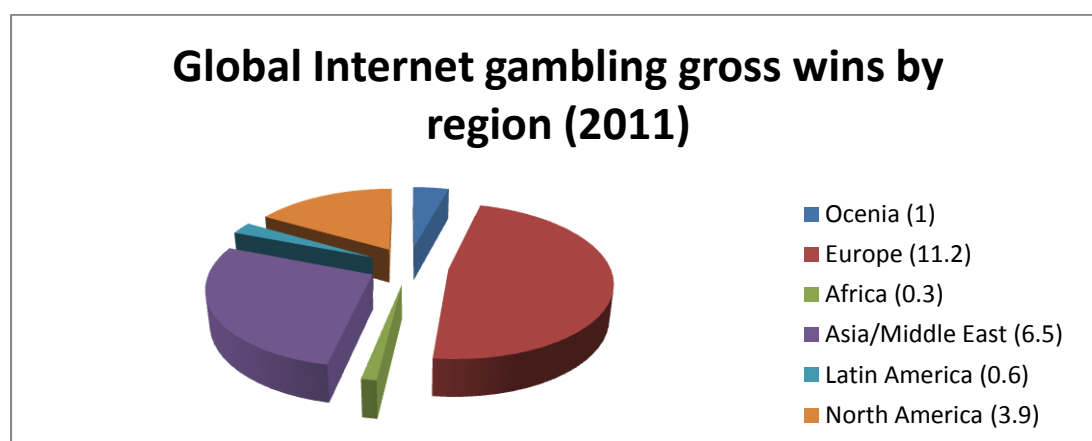


Figure 1: The figures above are provided in € billion.

As can be observed from the statistics provided above, although the global percentage of Internet gambling revenues generated from US customers has decreased, Internet gambling has continued to grow and remains an economically significant sector. The numbers provided above provide an overview of the size of gambling industries. Given the volume of the industry, an evaluation of any gambling-related topic that fails to consider the economic facts will be incomplete.

### 4.3. Gambling Laws in the US: A Federal Model

In the US the regulation of gambling activities has been among the powers reserved to the individual states. Therefore, the states are independent in determining whether to prohibit, restrict, permit and regulate intrastate gambling in accordance with the standards and guidelines provided by federal legislation. Thus, there are a variety of gambling regimes within the US, ranging from the very liberal approach of Nevada<sup>158</sup> and Louisiana to prohibitionist Utah and Hawaii. Despite the states' extensive authority in regulating gambling activities, starting from the 1870s, the Federal Government has also enacted laws relevant to

<sup>157</sup> 'H2 publishes preliminary eGaming Data for 2010 and extends forecasts to 2015' (2011) H2 Gamblin Capital 7 January 2011 Available: <http://www.h2gc.com/news.php?article=H2+publishes+preliminary+eGaming+Data+for+2010+and+extends+forecasts+to+2015> [Accessed 15 December 2011].

<sup>158</sup> Nevada does not allow lotteries and racetrack betting but has a quite extensive casino industry, on which a substantial percentage of the state economy depends.

gambling.<sup>159</sup> The primary purpose of these Federal legislations have been to aid the states to preserve their policy goals by preventing schemes that facilitate interstate gambling and evasion of their jurisdictions (Keller, 1999, Frey, 1998).<sup>160</sup> Accordingly, the violation of a state gambling law remains the necessary first step to invoke a federal gambling law, meaning that the underlying activity must first be illegal in the state where the gambling occurs and then satisfy a certain monetary or operational threshold.

Therefore, there are various legal systems in the US relevant to gambling, and the federal laws are designed primarily to protect state autonomy leading to the preservation of this right to remain diverse. However, the states' regulatory power is not absolute. The most striking example is the Professional and Amateur Sports Protection Act of 1992 which limits sports betting to four states<sup>161</sup> that approved it by a 1991 deadline. These four states had allowed sports betting activities prior to this act and were given an option to continue their operations based on this acquired right. New Jersey also had the right to opt in and was reluctant to do so in a timely manner, thus losing its right. As of 2012, several states including New Jersey, Iowa and Rhode Island, have approved sports betting at the state level and challenged the federal legislation, primarily on the grounds that it is discriminatory (Meer, 2011).

#### **4.3.1. Federal Regulation of Gambling**

There are numerous federal acts regulating various aspects of gambling. Among these, the Interstate Wire Act of 1961 (Wire Act), the Travel Act, the Anti Gambling Act and the UIGEA are the ones that provide the main framework for gambling activities on a federal level and that are most relevant to the cross-border provision of gambling services. Prior to *US-Gambling* only the first three federal acts were in force and they were interpreted as applying to Internet gambling-related disputes.

The federal government was involved in gambling matters for the first time in the 1870s in order to avoid further use of postal services for the interstate trade of lottery tickets. Later, the Wire Act was enacted with the intention of stopping illegal bookmakers from using wire

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<sup>159</sup> The first federal intervention was for the purpose of stopping the use of postal services for interstate lottery ticket sales when state laws were no longer sufficient to stop this trade. This example is often cited as an early example of gambling service providers utilizing technological advances to evade state laws (Rose and Owens Jr., 2009:77).

<sup>160</sup> This purpose is clear from various aspects, such as the targeted media, the wording of the laws and the effect of the rules. This intent is openly inscribed in the § 3001(a)(1)-(2) of Interstate Horse Racing Act of 1978 (IHA), 15. U.S.C.: "The Congress finds that ... the states should have the primary responsibility for determining what forms of gambling may legally take place within their borders (and) ... the Federal Government should prevent interference by one state with the gambling policies of another (Keller, 1999)".

<sup>161</sup> As of May 2012 sports-betting was legal only in Nevada, Delaware, Oregon and Montana.



communications for their business purposes. The Wire Act prohibits the use of wire communication by those engaged in the business of interstate or foreign commerce of betting or wagering for the transmission of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers. Years later, this Act became the centre of discussions regarding the legality of cross-border provision of Internet gambling services to the US when, in 2002, the DOJ interpreted it as prohibiting all forms of Internet gambling, although the Federal Court had limited its interpretation to sports betting.<sup>162</sup> Nine years later the DOJ also changed its position and issued a memorandum saying it had interpreted the Wire Act to exclude the interstate transmissions of wire communications that do not relate to a “sporting event or contest” (Seitz, 2011). This new opinion raised hopes in the Internet gambling industry concerning its potential to open the door for state regulation of Internet poker and other casino games.<sup>163</sup> The DOJ maintains its position on the issue that a bet, including an electronic or phone bet, occurs in the location it is placed and in the location at which it is received. To be legal, the bet must comply with the laws of the states at both ends of the transaction. Therefore, individuals or enterprises that solicit or accept bets in states that have not authorized them to engage in such conduct violate state criminal law, and in many cases, federal criminal law as well (Di Gregory, 1998).

The Travel Act was enacted in 1961 as part of the same series of legislation of which the Wire Act was a part, designed to combat organized crime and racketeering. It was drafted with the intention of prohibiting interstate travel or use of an interstate facility, including the postal services, with intention to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity. Here “unlawful activity” includes any business enterprise involving gambling and offenses in violation of the laws of the states in which they are committed or of the US. IGBA, 18 U.S.C. 1955, was enacted in 1970. It targets syndicated gambling and prohibits all illegal gambling

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<sup>162</sup> The US Court of Appeals for the Fifth Circuit ruled in November 2002 that the Federal Wire Act prohibits electronic transmission of information for sports betting across telecommunications lines but affirmed a lower court ruling that the Wire Act does not prohibit non-sports Internet gambling. Please see Section 4.3.1. of in re: Mastercard International Inc. Internet Gambling Litigation, 313 F.3d 257 2002, for the position of the DOJ.

<sup>163</sup> Please see WALSH, J. D. 2011. DOJ's Reversal on the Wire Act - What It Means for Internet Gaming. Available: <http://www.gtlaw.com/NewsEvents/Publications/Alerts?find=154860&printver=true> [Accessed 28 December 2011].

businesses. According to the act, the underlying activity must first be illegal in the state where the gambling occurs and then satisfy a certain monetary or operational threshold.

By the mid 1990s high speed Internet was quickly becoming a standard in the middle class American home. This development facilitated quite rapid growth in the Internet gambling industry. Once again, the states, unable to control the outflow of substantial funds, requested a federal solution. Pressures on the Federal Government to control and/or prohibit Internet gambling resulted in the enactment of the Security and Accountability For Every Port Act of 2006. Title VIII of the Act, also known as the UIGEA, has as its main purpose to prohibit the transfer of funds from a financial institution to an unlawful Internet gambling site, with the exception of fantasy sports, Internet lotteries, and horse/harness racing. The UIGEA makes nothing illegal that had not been previously considered illegal by the US authorities as per the existing laws mentioned herein above. The lawmakers intended to facilitate a system that would enable them to enforce existing laws with more clarity based on the assumption that, in accordance with existing laws all Internet gambling, unless explicitly allowed by law, is illegal (Balestra, 2007).<sup>164</sup>

The use of digital communication platforms for the supply of gambling services has raised many policy-related questions within the individual US states as has the federal response to the same. While it is widely accepted that Internet-gambling-specific policy issues exist, there have also been questions as to the potential efficacy and feasibility of the measures brought by the UIGEA. The concerned portion of the population took a deep breath with the so-called “prohibitions” enabled by the UIGEA. However, there have also been a number of attempts to legalize Internet gambling. More than six bills have been submitted to Congress since 2009. The recent economic recession and the urgent need to raise funds are the main attraction of these bills for individual states.<sup>165</sup> Meanwhile, the changed opinion of the DOJ has raised hopes in the Internet gambling industry that Congress may alter its stance at least regarding the use of the Internet for poker and casinos.<sup>166</sup> Whether or not Congress changes

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<sup>164</sup> In accordance with the states’ and Indian tribes’ expectations, UIGEA excluded “placing, receiving or otherwise transmitting a bet or a wager where ... the bet or wager is initiated and received or otherwise made exclusively (I) within a single state, (II) within Indian lands of a single tribe; or (II) between the lands of two or more Indian tribes” from the definition of unlawful Internet gambling.

<sup>165</sup> For more information please see Rose (2010).

<sup>166</sup> Please see GRUENWALD, J. 2012. Administration Decision on Internet Gambling May Force Congress's Hand. National Journal [Online]. Available: <http://www.nationaljournal.com/tech/administration-decision-on-internet-gambling-may-force-congress-s-hand-20120106>.

its position it is very likely that this change of opinion will encourage a number of states to pass laws legalizing use of the Internet for poker and casino games.

The developments within the US are significant in displaying the interactions among federal institutions and state institutions in an area primarily accepted as one which states are left to regulate. The Internet gambling experience has shown that federal involvement to be quite relevant in addressing issues that go beyond the borders of a state.

#### **4.3.2. Relevant Principles of the GATS**

GATS, the first and only set of multilateral rules covering international trade in services, was produced as a result of the Uruguay Round and is a part of the Uruguay Final Act that came into force in January 1995.<sup>167</sup> It consists of two parts: The framework agreement, the first part, prescribes general rules and disciplines, whereas the second part consists of the Schedule of Commitments (Schedule). The Schedule is a list of individual countries' specific commitments to allow foreign suppliers access to their domestic markets.<sup>168</sup>

The framework agreement applies to any service in any sector except the services supplied in the exercise of governmental authority.<sup>169</sup> Accordingly, these excluded services cannot be supplied on a commercial basis or in competition with one or more service suppliers.<sup>170</sup> A large number of the member states allow provision of gambling services via monopolies under strict governmental control and therefore have not been sector to be liberalized.

The two primary general obligations of GATS members are most favoured nation (MFN) treatment and basic transparency provisions. According to the MFN obligation, members are obliged to not discriminate among their trade partners (Delimatsis, 2007:27).<sup>171</sup> The basic transparency provisions require WTO member states to publish all national measures and international agreements affecting their obligations under GATS prior to their coming into

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<sup>167</sup> The Uruguay Final Act is the successor of the General Agreement on Tariffs and Trade ("GATT"). GATT had been created to promote and set rules for multilateral trading system for trade of goods. It was intended to extend this system to the services sector with GATS.

<sup>168</sup> Please see 'GATS Facts and Fiction' (2012) Available: [http://www.wto.org/english/tratop\\_e/serv\\_e/gats\\_fact\\_fiction1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gats_fact_fiction1_e.htm) [Accessed 15 January 2010].

<sup>169</sup> Art. I:3(b) GATS

<sup>170</sup> Art. I:3(c) GATS

<sup>171</sup> "However, under the Annex on Article II Exemptions, there is a possibility for Members, at the time of entry into force of the Agreement (or date of accession), to seek exemptions not exceeding a period of ten years in principle. More than 80 Members currently maintain such exemptions, which are mostly intended to cover trade preferences on a regional basis. The sectors predominantly concerned are road transport and audiovisual services, followed by maritime transport and banking services" Please see 'Introduction to GATS' (2006) WTO Available: [http://www.wto.org/english/tratop\\_e/serv\\_e/serv\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/serv_e.htm) [Accessed 15 January 2006].

force, and to notify the Council for Trade in Services of any relevant changes. It also requires WTO member states to respond promptly to the information requests of other WTO member states'. The other general obligations are concerned with the availability of legal remedies, the compliance of monopolies and exclusive providers with the MFN obligation and the consultations on business practices and subsidies that affect trade.

There are additional obligations that apply only to the sectors that the WTO member states have committed in their Schedules, namely market access<sup>172</sup> and national treatment.<sup>173</sup> These commitments guarantee minimum levels of treatment, but do not prevent WTO member states from being more open in practice.<sup>174</sup>

According to the market access commitment a WTO member state shall not adopt or maintain measures which would limit the modes of supply<sup>175</sup> in contrary to the specific commitments prescribed in its Schedule. These measures may appear in the form of limitations on the number of service suppliers, the total value of service transactions or assets, the total number of service operations or on the total quantity of service output, total number of natural persons employed in a particular service sector or that a service supplier may employ and on the participation of foreign capital.<sup>176</sup> Therefore, unless indicated in their Schedules, the WTO members may not adopt any restrictions that fit the description above.

The national treatment commitment relates to discriminatory measures and aims to ensure that foreign and national service suppliers are provided equal opportunities to compete (Diaconu, 2010:47). In this context each WTO member state provides the services and services suppliers of any other WTO member state, treatment no less favourable than it provides to similar national services and service suppliers.

### **4.3.3. Modes of Supply**

In GATS, four modes of supply are defined. Among these, Modes 1 and 2 are relevant to *US-Gambling*. Cross-border supply occurs when services are provided from the territory of one member state into the territory of any other member state (Mode 1). Consumption abroad (Mode 2) takes place when services are provided in the territory of one WTO member state to

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<sup>172</sup> Art. XVI GATS

<sup>173</sup> Art. XVII GATS

<sup>174</sup> 'Main Building Blocks: Agreement, Annexes, and Schedules' at: [http://www.wto.org/english/tratop\\_e/serv\\_e/cbt\\_course\\_e/c2s5p1\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/cbt_course_e/c2s5p1_e.htm) [Accessed 15 December 2010].

<sup>175</sup> Please see 4.3.3. below for an explanation of "Modes of Supply".

<sup>176</sup> Art. XIV(2) GATS

the consumers of any other WTO member state. In commercial presence; a WTO member state as service provider establishes itself in the territory of another (Mode 3). Finally, in Mode 4, individuals travel temporarily from one WTO member state to another to provide services.

Prior to the emergence of Internet gambling, the most common way to consume gambling services provided by or from another state was to travel there and consume while visiting that state. The most popular gambling venue for this type of consumption was casinos. It was a very common practice for states with more relaxed gambling regimes to build casinos in their border towns closest to the neighbouring states with more restrictive regimes in order to attract cross-border business. This sort of supply is classified under Mode 2, and so far gambling services have not been subject to any judicial dispute for being available for consumption abroad.

The cross-border provision of Internet gambling services falls under the Mode 1 type of supply, where gambling services are provided from servers located in states with more permissive regimes. This type of supply also covers provision via postal services, phone and television. An essential point related to modes of supply and Internet gambling services is that GATS is technology neutral, which in turn means that services supplied electronically are covered in GATS in the same way as any other means of delivery (Zleptnig, 2007).<sup>177</sup> Although provision via digital communication platforms is a fairly new phenomenon, other telecommunication media have been utilized for this purpose previously.<sup>178</sup>

#### **4.4.Exceptions to States' Obligations under GATS**

In accordance with Article XIV of GATS<sup>179</sup>, the WTO member states may adopt and enforce measures that are not in compliance with the terms of GATS only under exceptional

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<sup>177</sup> Please see 'Work programme on electronic commerce: interim report to the General Council', WTO Council for Trade in Services, 31 March 1999, No:S/C8.

<sup>178</sup> Please refer to Section 2.3.1.

<sup>179</sup> Article XIV: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order;(5)
- (b) necessary to protect human, animal or plant life or health;
- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
  - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

circumstances. According to Article XIV (a) and (c) the exceptional circumstances occur when the said measures are necessary to protect public morals or to maintain public order or to secure compliance with laws or regulations which are not inconsistent with the provisions of GATS.

It is also emphasized in GATS Article XIV that these measures will not be protected under the shield of this article if their conduct becomes “a way of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services”. GATS Article XIV(a) provides that the public order exception may not be invoked unless there is “a genuine and sufficiently serious threat posed to one of the fundamental interests of society”. However, no explanation is provided of the public morals exception in the text of the article.

The respect shown in GATS’s to national policy objectives is also emphasized in the Preamble of the agreement, in which WTO member states’ right to regulate the supply of services within their territories in order to meet national policy objectives is specifically recognized.

#### **4.4.1. US-Gambling: The Timeline**

In 1994, in an effort to diversify its economy, Antigua’s parliament passed the Free Trade and Processing Zone Act and invested in the development of its telecommunication infrastructure. This legislative move attracted some of the first Internet gambling businesses to Antigua. A year later, GATS came into force and the first Internet gambling site started operations in Antigua.<sup>180</sup>

In 1997, with twenty companies already registered there, Antigua became one of the first and most popular jurisdictions to specifically regulate and license Internet gambling and betting

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(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other Members;

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound.

Footnote 5: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

<sup>180</sup> Please See ‘Internet Gambling Fact Sheet’, American Gaming Association (AGA), 2009 at [http://www.americangaming.org/Industry/factsheets/issues\\_detail.cfv?id=17](http://www.americangaming.org/Industry/factsheets/issues_detail.cfv?id=17) [Accessed 12 January 2009].

companies.<sup>181</sup> According to the Antiguan Government, by 1999, gambling businesses accounted for almost 10% of the country's gross domestic product. Also, the US had become the most lucrative market for the Internet gambling industry, by far.<sup>182</sup>

Given gambling industries' less than perfect reputation, well deserved over a few centuries, the vast growth of an Internet gambling market provided mainly by foreign providers prompted negative reactions. In a number of lawsuits around the US, the courts interpreted the state and federal laws in force, as prohibiting the cross-border provision of Internet gambling services, particularly betting. In early 2003, a bill making it illegal for payment processing companies to facilitate on-line gambling transactions was passed in the House of Representatives. Advertising had also become difficult for the industry under this uncertain legislative environment.<sup>183</sup>

On March 13th, 2003 Antigua, one of the smallest members of the WTO, filed a complaint at the WTO, regarding the US prohibition of cross-border gambling services offered by operators established in Antigua. Their claim was that; the US measures were inconsistent with its obligations under GATS and that the impact of these measures was to prevent the supply of gambling and betting services from another WTO member state on a cross-border basis. Canada, EC, Japan, China and Mexico joined the case as third parties. The involvement of almost all the major economies of the world as third parties demonstrated the global interest in cross-border provision of Internet gambling services.

This dispute is of the utmost relevance to the broader topic of this dissertation. The Panel's and the Appellate Body's approval of the WTO member states' right to regulate cross-border provision of gambling services under the public morals and public order exceptions clause and the review standards applied by both courts to the restrictions of both courts and their rulings constitute essential indications of the WTO's perspective on state autonomy in regulating areas related to public morals (and public order). This topic will be further explored in Chapter IV.

#### **4.5.US Laws Subject to DSB Review: Measures at Issue**

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<sup>181</sup> Virtual Casino Wagering and Sports Book Wagering Regulations 1997, Antigua and Barbuda No: 20.

<sup>182</sup> Please refer to Section 4.2.

<sup>183</sup> The U.S. District Court for the Middle District of Louisiana dismissed a case in February 2005 in which the plaintiff claimed protection under 1st Amendment in advertising Internet gambling companies. The ruling stated that Internet gambling activity was illegal, thus was not protected by 1st Amendment (*Casino City, Inc. v. United States Dep't of Justice* (2004) Middle District of Louisiana Civil Action No 04-557-B-M3)

In its Panel request Antigua listed 93 different state and federal laws of the US, the cumulative effect of which result in the total prohibition of cross-border Internet gambling services inconsistently with its Schedule and with GATS Articles II, VI, VIII, XI, XVI. XVII. Among the US laws listed by Antigua, the Panel considered the Wire Act, the Travel Act (when read together with relevant state laws), IGBA (when read together with relevant state laws) and eight state laws<sup>184</sup> as measures at issue. Later, the Appellate Body dismissed the Panel's finding on the eight state laws<sup>185</sup> on the basis that Antigua had not made a *prima facie* case with regard to them. Also, having found that the subject measures were necessary under Article XIV(a), the Appellate Body did not review the Panel's findings in relation to Article XIV(c).<sup>186</sup> Ultimately, the three federal laws were ruled as measures at issue with regard to cross border supply of gambling and betting services.

## 4.6.The Rulings

### 4.6.1. The Schedule of Commitments

In order to determine the scope of US' obligations, the initial step for both the Panel and the Appellate Body was to determine whether the US had made specific commitments with regard to gambling and betting services in its schedule. The Panel found that the US schedule to the GATS included gambling and betting services under sub-section 10.D, entitled "Other Recreational Services (except sporting). In its review the Panel firstly considered dictionary definitions of the words *entertainment*, *recreational* and *sporting* in English, French and Spanish.<sup>187</sup> This review provided no conclusive result. The Panel then conducted a second interpretation based on Article 31 of the Vienna Convention on the Law of Treaties (Vienna Convention)<sup>188</sup> and consulted contextual documents and supplementary means of interpretation. The first two contextual documents were the scheduling guidelines circulated by the Secretariat during the Uruguay Round negotiations (1993 Scheduling Guidelines) and the Services Sectoral Classification List prepared by the GATT Secretariat (W/120). Herein, the Panel also considered the remainder of the US Schedule of specific commitments, the

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<sup>184</sup> C§ 18-10-103 of the Colorado Revised Statutes; § 14:90.3 of the La. Rev. Stat. Ann.; § 17A of chapter 271 of Mass. Ann. Laws; §§ 609.75, Subdivisions 2 – 3 and 609.755(1) of Minn. Stat. Ann; paragraph 2 of N.J. Const. Art. 4, Sec. VII and § 2A:40-1 of the N.J. Code; § 9 of Art. I of N.Y. Const. and § 5-401 of the N.Y. Gen. Oblig. L.; South Dakota: §§ 22-25A-1 - 22-25A-15 of the S.D. Codified Laws; and Utah: § 76-10-1102 of the Utah Code Ann.

<sup>185</sup> Please see paragraph 218 *US-Gambling* Appellate Body Report.

<sup>186</sup> Please see paragraph 337 *US-Gambling* Appellate Body Report.

<sup>187</sup> Paragraph 6.47 *US-Gambling* Panel Report.

<sup>188</sup> Articles 31-3 of the Vienna Convention on the Law of the Treaties sets out general rules for treaty interpretation.



substantive provisions of the GATS, the provisions of covered agreements other than the GATS and the GATS Schedules of the other WTO member states.<sup>189</sup> It then also evaluated supplementary means of interpretation pursuant to Article 32 of the Vienna Convention. These included cover notes to the US draft schedules and a document prepared by the US Trade Commission regarding the interpretation of its own schedule<sup>190</sup>. Upon consideration of these documents the Panel found that the US schedule included specific commitments on gambling and betting services.<sup>191</sup>

The Appellate Body confirmed this finding, although it differed in its reasoning. The Appellate Body found the dictionary reference too mechanical for the purpose and objected to the references to languages<sup>192</sup> other than the one in which the US Schedule was signed.<sup>193</sup> The Appellate Body also mentioned that the 1993 Scheduling Guidelines and the W/120 had not been prepared or signed by the parties and thus could not be considered contextual documents for interpretation, but could be used as supplementary documents. However, Appellate Body did not object to contextual interpretation under other documents which did not provide a conclusive explanation as to the scope of the US Schedule.<sup>194</sup>

Despite the fact that the Appellate Body found several errors in the Panel's interpretation and reasoning, it reached the same result and concluded that subsector 10.D of the US' GATS Schedule included a specific commitment with respect to gambling and betting services.<sup>195</sup>

#### **4.6.2. Market Access & Mode of Supply**

On the issue of market access, the Panel found that the measures adopted by the US were inconsistent with its obligations. The Appellate Body upheld this finding. In this section, the Appellate Body Report also clarified the WTO's view on the method of supply for remote gambling. Accordingly, it was found to be supplied from Antigua into the US across borders, under Mode 1.

The first issue decided by the Panel was the interpretation of the US Schedule, in which the US had stated its choice of limitations on market access. The Panel's interpretation was that

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<sup>189</sup> Paragraph 178 *China- Publications and Audiovisual Products* Appellate Body Report

<sup>190</sup> It is shortly referred to as the USITC document.

<sup>191</sup> Paragraph 6.134 *US-Gambling* Panel Report.

<sup>192</sup> The Panel had referred to the French and Spanish versions.

<sup>193</sup> Paragraph 166 *China-Publications and Audiovisual Products* Appellate Body Report

<sup>194</sup> Paragraph 195 *China-Publications and Audiovisual Products* Appellate Body Report

<sup>195</sup> The method of treaty interpretation received some criticism. However, discussion of this technical issue exceeds the scope of this research. For a comprehensive coverage of the issue please see (Ortino, 2006)

by inscribing the word “none” in the relevant columns, the US had committed to full market access.<sup>196</sup> The Panel then interpreted the scope of Mode 1 to identify whether services provided via the Internet across borders would be considered as falling under this mode of supply. In that regard, Mode 1 includes every possible means of services supply from the territory of one WTO member state to the territory of the other. Here the Panel also referred to another, much anticipated topic, namely the application of the technological neutrality principle to modes of supply. The Panel concluded that, it was in line with this principle that, Mode 1 under the GATS should include all possible means of supplying services, whether by mail, telephone, Internet and so on unless otherwise specified in a WTO member state's Schedule. The Panel also pointed out that technological neutrality is a principle largely shared among WTO member states according to the Work Programme on Electric Commerce adopted by the Council for Trade in Services,<sup>197</sup> where the technological neutrality principle had been agreed to by most WTO member states. Therefore, if full market access commitment had been made for Mode 1, any prohibition on the means of delivery included in Mode 1 would constitute a limitation on market access. The Appellate Body did not refer to the technological neutrality principle.

The Panel then evaluated the effect of the restrictions placed by the US on the supply of Internet gambling services from another WTO member state and found that the subject prohibitions resulted in a “zero quota” which constitutes a “limitation on the number of service suppliers in the form of numerical quotas’ within the meaning of Article XVI:2(a)” and “a limitation ‘on the total number of service operations or on the total quantity of service output ... in the form of quotas’ within the meaning of Article XVI:2(c)”.<sup>198</sup>

Consequently, the Panel concluded that the US had acted inconsistently with Article XVI:1 and sub-paragraphs (a) and (c) of Article XVI:2, violating of its market access commitments by maintaining the Wire Act, the Travel Act<sup>199</sup> and the IGBA<sup>200</sup> and four other state laws.<sup>201</sup>

The analyses of the Panel and the Appellate Body under Article XVI regarding market access were more or less parallel. The initial step was, as requested in the US's appeal, the review of

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<sup>196</sup> Paragraph 6.279 *US-Gambling* Panel Report

<sup>197</sup> For the full text: Please see Work Programme on Electric Commerce - Progress Report to the General Council (19 July 1999).

<sup>198</sup> Paragraph 6.355 *US-Gambling* Panel Report

<sup>199</sup> I.e., when read together with relevant state laws.

<sup>200</sup> I.e., when read together with relevant state laws.

<sup>201</sup> Louisiana: § 14:90.3 of the La. Rev. Stat. Ann.; Massachusetts: § 17A of chapter 271 of Mass. Ann. Laws; South Dakota: §§ 22-25A-1 - 22-25A-15 of the S.D. Codified Laws; and Utah: § 76-10-1102 of the Utah Code

the Panel's interpretation of sub-paragraphs (a) and (c) of Article XVI(2). The Appellate Body upheld the Panel's decisions on both accounts.<sup>202</sup> The second step was the review of the application of these articles to the case, which was also upheld by the Appellate Body.<sup>203</sup>

#### **4.6.3. Exceptions Provisions**

The most important difference between the reports of the Panel's and the Appellate Body's was on the issue of exceptions provisions. Although both reports indicated that the prohibitionist measures of the US could not be exempted under Article XIV(a) and (c), their reasoning differed once again. The challenge for both courts was that this article was being invoked for the first time in the context of GATS, whereby the Panel had to interpret these articles without recourse to any case law in the services sector.<sup>204</sup>

##### **4.6.3.1. Article XIV (a)**<sup>205</sup>

The US argument was that the protection of a society, its members and their property from the effects of organized crime was a matter of public morals and public order. As the cross-border supply of gambling services is particularly susceptible to criminality, especially organized crime, the exceptions clause should apply to this case. The protection of minors was added as an additional major concern and a matter of public morals. The Panel also considered additional issues raised by the US in other sections of its submissions including money laundering, fraud, other criminal activities and health risks.<sup>206</sup>

In its review, the Panel initially referred to the "wording" of the three federal acts and to the congressional statements regarding purposes of enactment. Accordingly, the Panel reached the conclusion that the acts were designed to protect public morals or maintain public order. Secondly, the Panel considered whether the subject measures were necessary. This assessment was undertaken in three steps, in accordance with the previous jurisprudence of the Appellate Body. The first step evaluated the importance of the interests or values protected. This analysis was based on relevant congressional statements. The Panel found that

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<sup>202</sup> Paragraph 239 and 252 *US-Gambling* Appellate Body Report

<sup>203</sup> Paragraph 265 *US-Gambling* Appellate Body Report

<sup>204</sup> The Panel referred to previous case law under GATT because Article XX of GATT presents similarities to Article XIV of the GATS.

<sup>205</sup> Article XIV (a) GATS states, "...Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order; ..." The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society"

<sup>206</sup> Paragraph 6.479 *US-Gambling* Panel Report

the protected interests were vital and important in the highest degree.<sup>207</sup> In the second step of its analysis the Panel evaluated the extent to which these acts contributed to the realization of the ends. The analysis was again of the wording of these acts. Once again, the Panel concluded in favour of the US. The last step of the analysis tested the trade impact of the acts. Antigua claimed their effect was total prohibition, and the Panel agreed that the acts had a significant impact on trade. This assessment was conducted comparatively with the measures adopted by the US to address similar concerns, in search for a WTO consistent alternative. However, the US argued that such an alternative did not exist. The Panel pointed out that the US had failed to engage in consultations and/or negotiations with Antigua to explore alternative GATS consistent solutions. Then the Panel applied a weighing and balancing test to the elements it had evaluated. In sum, the Panel concluded that the US had legitimate public order concerns and the measures contributed to the realization of the ends pursued to an extent. However, it could not claim protection under this Article XIV(a) because it had refused to engage in consultations with Antigua.<sup>208</sup>

#### **4.6.3.2. Article XIV(c)<sup>209</sup>**

In relation to Article XIV(c), the Panel applied another three-step analysis. In the first two steps, the Panel analysed whether the subject measures secured compliance with other laws or regulations and whether those other laws were consistent with the WTO Agreement. In the last step the Panel analysed whether the subject measures were necessary to secure compliance with those other laws or regulations. In this analysis the Panel found that the US could not provisionally justify the necessity of the three federal acts<sup>210</sup> to secure compliance with the Racketeer Influenced and Corrupt Organizations Act (RICO) statute.<sup>211</sup>

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<sup>207</sup> Paragraph 6.492 *US-Gambling* Panel Report

<sup>208</sup> Paragraph 6.535 *US-Gambling* Panel Report

<sup>209</sup> Article XIV (c) states that "...Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures: ... (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to: (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts; (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; (iii) safety;..."

<sup>210</sup> Within the meaning of Article XIV(c).

<sup>211</sup> The Panel acknowledged that the three Federal Acts were important in the enforcement of US criminal laws related to organized crime. Please see paragraph 6.535 *US-Gambling* Panel Report

The initial review analysed whether the laws and regulations relied upon by the US were WTO consistent. Some of the state laws<sup>212</sup> that the US relied upon were found to be inconsistent with the US's commitments in its Schedule, and others were found to be not properly defined by the US. There were also criminal laws relied upon by the US related to organized crime, specifically RICO. The Panel found that the US could rely on RICO in asserting Article XIV(c) and conducted its analysis based on this finding.

The second step was to discern whether the Wire Act, Travel Act and IGBA secured compliance with the RICO statute as the US had claimed. The Panel found in favour of the US, and then applied the three step necessity test to determine whether such were necessary measures to secure compliance.<sup>213</sup> The Panel found that the interests aimed to be protected by RICO were “vital and important to the highest degree”<sup>214</sup> and that the three federal acts made an important contribution to the enforcement of local laws against organized crime. Therefore, the trade impact of the subject restriction was significant given its effect of total prohibition. The Panel pointed out that the US did not properly explore WTO-consistent alternatives for these restrictions that would also address organized crime concerns by not engaging in consultations or negotiations with Antigua. Therefore the US could not justify the necessity requirement for the three federal acts within the meaning of Article XIV(c).

#### **4.6.3.3. The Chapeau of Article XIV<sup>215</sup>**

The Panel investigated further to determine whether the chapeau of Article XIV had been complied with. The sole purpose of this investigation was to assist the parties in resolving the underlying dispute in this case. The Panel referred to the earlier cases that had been evaluated under the chapeau of Article XX of GATT.<sup>216</sup> In accordance with the case law, the Panel explored whether the US restrictions were applied in a manner that did not constitute

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<sup>212</sup> I.e., the state Laws of Louisiana, Massachusetts, South Dakota and Utah.

<sup>213</sup> These were as follows: 1. the importance of the interests or values that the RICO statute is intended to protect; 2. the extent to which the Wire Act, the Travel Act and IGBA contribute to the realization of the end pursued, that is, to secure compliance with the RICO statute; and 3. the trade impact of the Wire Act, the Travel Act and the IGBA. Please see paragraph 6.557 *US-Gambling* Panel Report

<sup>214</sup> Paragraph 6.556 *US-Gambling* Panel Report

<sup>215</sup> The chapeau of Article XIV provides: “Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures [of the type specified in the subsequent paragraphs of Article XIV]....”

<sup>216</sup> The cases it had referred to were: *US-Gasoline* and *US-Shrimp*. (Respectively: United States — Standards for Reformulated and Conventional Gasoline DS2 1996 WTO Appellate Body and United States — Import Prohibition of Certain Shrimp and Shrimp Products DS58 1998 WTO Appellate Body).

“arbitrary and unjustifiable discrimination between countries where like conditions prevail” and/or a “disguised restriction on trade”.

The subjects of analysis were whether

- i. the US was enforcing the same restrictions on local suppliers as well,<sup>217</sup>
- ii. video lottery terminals would qualify as remote gambling,
- iii. Nevada bookmakers were offering their services via Internet and the phone,
- iv. IHA allowed remote betting.

The conclusion was that the US had not demonstrated that it had applied its prohibition to the remote supply of betting services for horseracing on the indicated local suppliers and that there was no ambiguity relating to the IHA. Therefore, the US had failed to satisfy the requirements of the chapeau of Article XIV.

#### **4.6.3.4. The Appellate Body**

The Appellate Body reversed the Panel’s finding that the US could not rely on Article XIV (a) or (c) because it did not engage in negotiations and/or consultations with Antigua. The Appellate Body upheld the Panel’s finding that the three federal acts did fall within the scope of public morals and/or public order under Article XIV(a) but found the necessity analysis flawed. The Appellate Body emphasized that engaging in consultations and negotiations was not an alternative measure available to the US but rather a process the end of which was uncertain. The Appellate Body reversed this finding because reliance on this process was not appropriate.<sup>218</sup>

The Appellate Body conducted its investigation differently and found that the US had satisfactorily proved that the three federal laws at issue were measures necessary to protect public morals and to protect public order and that they fall within the scope of paragraph (a) of Article XIV.

The Appellate Body did not conduct an analysis of the Panel’s review under Article XIV(c), because it had already found that the Wire Act, the Travel Act, and the IGBA fall under paragraph (a) of Article XIV, so that and it was unnecessary conduct a review as to whether these measures were also justified under paragraph (c) of Article XIV.<sup>219</sup>

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<sup>217</sup> These local suppliers were: Youbet.com, TVG, Capital OTB and Xpressbet.com.

<sup>218</sup> Paragraphs 299, 317-8, 321, 327 *US-Gambling* Appellate Body Report

<sup>219</sup> Paragraph 337 *US-Gambling* Appellate Body Report

The Appellate Body partly upheld the Panel's findings under the chapeau of Article XIV and decided that the US had failed to show, in the light of the Intrastate Horseracing Act, that the prohibitions embodied in these measures were applied to both foreign and domestic service suppliers of remote betting services for horse racing. Thus, it was not established that these measures satisfied the requirements of the chapeau of Article XIV.<sup>220</sup> The US had once again failed to invoke the GATS exceptions provisions successfully (Hubert, 2008). The Appellate Body ruling reduced the Internet gambling regulation issue to a problem of non-discrimination by accepting the public morals exception.

The Appellate Body recommended that the DSB request that the US bring the measures at issue found to be inconsistent with GATS into conformity with its obligations. On 20 April 2005, the DSB adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report.

#### **4.6.3.5.A note on the interpretation of Article XIV(a)**

The first-time interpretation of Article XIV(a) was probably the most significant aspect of the *US-Gambling* rulings. These rulings revealed the applicable review standards of the WTO and their perception of the limits of state autonomy in regulating trade in areas related to public morals. Soon after, the public morals exception was invoked once again, this time, under GATT Article XX(a) in the *China- Publications and Audiovisual Products* case, and the WTO position was further clarified. The WTO acknowledges the diversity of the values of the WTO member states (which are reflected in their public morals) and also their right to regulate these areas. The WTO member states can adopt the level of protection they deem appropriate. However, based on their membership in the WTO, the subject measures will have to satisfy certain standards under the assessment of the DSB. The wording of the legislation at issue should verify that member states public policy claims and there should be no less-restrictive measures available to achieve the same policy goals. In the process of reaching these conclusions the DSB had to address some prior issues.

For example, the scope of the “protection of the public morals” and the “maintenance of public order” was defined for the first time in *US-Gambling*. Even though the term “public morals” also existed in GATT Article XX(a) it had not yet been interpreted by the Panel or the Appellate Body and the phrase “public order” had not been used in GATT. The Panel defined both as dynamic concepts which “vary in time and space, depending upon a range of

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<sup>220</sup> Paragraph 369 *US-Gambling* Appellate Body Report

factors, including prevailing social cultural, ethical and religious values”. Moreover, given the diversity of the WTO members, each should define the scope of both concepts they apply to them and determine the level of protection they deem appropriate with reference to certain earlier decisions of the Appellate Body.<sup>221</sup> Despite this acknowledgement, the Panel found it necessary to provide a WTO perception of these terms in order to facilitate effective interpretation of the treaties.

Based on dictionary definitions, the term “public morals” refers to the “standards of right and wrong conduct maintained by or refers to the people within a community or a nation as a whole”.<sup>222</sup> In order to define “public order” the Panel merged the dictionary definition of order and the explanatory footnote of Article XIV(a).<sup>223</sup> As a result this term refers to “the preservation of the fundamental interests of a society, as reflected in public policy and law”, whereas the fundamental interests can relate to the “standards of law, security and morality”.<sup>224</sup>

In *US-Gambling*, the Panel also had to decide whether gambling activities fall within the category of public morals and public order, a matter disputed among the parties. In its analysis, the Panel referred to examples of other WTO member states, the ECJ decisions and even historic examples to show that supply of gambling services has been considered a matter of public morals and/or public order not only for the US but also for other WTO member states.<sup>225</sup> This justification, which established an almost universal acceptance of the relationship between gambling and public morals and public order, seems unnecessary, and even appears to contradict the acknowledgement that these values may differ for each state, considering that the US may have been the only nation in which gambling was a matter of public order or public morals.<sup>226</sup> In the end, the Panel decided that the provision of gambling services, whether Internet or by other means, falls within the scope of Article XIV(a). Given states may differ in terms of their concerns for public order and public morals, the Panel should have evaluated US laws and policies in terms of their consistency with the subject restrictions, unilaterally.

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<sup>221</sup> Paragraph 176 *Korea- Various Measures on Beef Appellate Body Report*, and paragraph 168 *EC-Asbestos Appellate Body Report* and paragraph 6.461 *US-Gambling Panel Report*.

<sup>222</sup> Paragraph 6.465 of *US-Gambling Panel Report*

<sup>223</sup> This section states that the public order exception could be invoked “only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society”.

<sup>224</sup> In *US-Gambling*, paragraph 6.4670 the Panel referred to an ICJ interpretation of public order, as well, to support its argument.

<sup>225</sup> Paragraphs 6.472 - 6.475 *US-Gambling Panel Report*

<sup>226</sup> For a wider discussion please see Marwell (2006).



As a matter of fact, the Panel based its final assessment on whether the subject restrictions were designed to protect the claimed values with reference to US congressional reports and the testimony and wording of the Acts. The Appellate Body approved this analysis and did not comment on the references to documents and evidence from outside the jurisdiction of the US.

Soon after this case, the WTO had to decide whether trade restrictions placed on reading materials and finished audiovisual products was justified under the GATT Article XX(a) public morals exception. China argued that these products were “cultural goods” which could have a major impact on public morals according to their content. In support of its argument China referred to the UNESCO Universal Declaration on Cultural Diversity,<sup>227</sup> which had also been adopted by the US, the complainant in the dispute at hand.<sup>228</sup> The Panel did not scrutinize this assertion because the US did not challenge China’s claim that the prohibited items were relevant to and could have a negative impact on public morals.

Once again, the Panel emphasized that the WTO member states “should be given some scope to define and apply for themselves—the public morals concept—in their respective territories, according to their own systems and scale of values”.<sup>229</sup> Therefore, it is difficult to know definitively whether the Panel took the UNESCO Universal Declaration on Cultural Diversity into consideration or accepted China’s assertion as satisfactory in deciding what qualifies as legitimate public morals.

Another issue, the discussion of which was highly anticipated under this title was the effect of the use of electronic media on public morals and public order. Indeed, the Panel recognized some of the US’s concerns to be specific to the remote supply of gambling services. Therefore, the fact that the US had been a significant consumer of land-based gambling services did not prevent the US from claiming that cross-border provision of the gambling services could raise public order and public morals concerns. Therefore, its WTO-consistent measures in regulating non-remote gambling services did not set an example for regulating Internet gambling.<sup>230</sup> This reasoning was approved by the Appellate Body.<sup>231</sup> Therefore, the Panel concluded that the different means of trade could trigger different public morals and

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<sup>227</sup> In Article 8, the Declaration states that cultural goods are “vectors of identity, values and meaning” and that they “must not be treated as mere commodities or consumer goods”.

<sup>228</sup> Paragraph 7.751 *China-Publications and Audiovisual Products* Panel Report

<sup>229</sup> Paragraph 7.763 *China-Publications and Audiovisual Products* Panel Report

<sup>230</sup> Paragraphs 6.498 and 6.521 *US-Gambling* Panel Report

<sup>231</sup> Paragraph 313 *US-Gambling* Appellate Body Report

public order concerns. The Appellate Body did not discuss this conclusion within the context of the principle of “technological neutrality”,<sup>232</sup> although earlier in its ruling the Panel had ruled that means of provision would not have an effect on the interpretation of its Schedule of Commitments.

In the *China-Publications and Audiovisual Products* case neither the Panel nor the Appellate Body referred to the technological neutrality principle, although electronic means of transfer were significant to the trade-restrictive measures that had been the subject of the dispute (Delimatsis, 2010).

#### **4.6.4. Implementation of the Ruling**

On 19 May 2005, at the first DSB meeting after the Appellate Body Report, the US stated its intention to implement the DSFB’s recommendations and requested a reasonable period of time in which to do so. Although the request was realized via an arbitrator, the US did not implement the recommendations, either within the given time frame, which expired on 3 April 2006, nor thereafter. The US chose to remove gambling services from its Schedule instead of implementing the ruling, but continued negotiations with the third parties separately. Arguing that the US had failed to comply with the DSB recommendations, a new Panel was composed upon Antigua’s request on 16 August 2006, whereupon China, the European Communities (EC) and Japan reserved their third party rights.

Meanwhile, in September 2006, the US Congress passed the UIGEA prohibiting banks, financial institutions, and other third-party money exchange operations from processing payments to offshore gambling sites located outside the US jurisdiction. Any activity allowed under the IHA was exempted from its scope, as well as securities transactions, fantasy sports, state lotteries, and gambling on Tribal lands.<sup>233</sup>

On 30 March 2007, the Panel concluded that the US had failed to comply with the recommendations and the rulings of the DSB. A few months later, Antigua requested

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<sup>232</sup> According to which the WTO member states shall not distinguish between the different technological means through which services may be supplied. Please see paragraph 4 of the Work Programme on Electric Commerce - Progress Report to the General Council 19 July 1999): “It was also the general view that the GATS is technologically neutral in the sense that it does not contain any provisions that distinguish between the different technological means through which a service may be supplied”. The US seemed to agree, as is evident from the following comments made by it in a submission contained in WT/GC/16, p. 3: “There should be no question that where market access and national treatment commitments exist, they encompass the delivery of the service through electronic means, in keeping with the principle of technological neutrality” Paragraph 6.285 *US-Gambling* Panel Report.

<sup>233</sup> § 5362 (1)(5) UIGEA

authorization from the DSB to suspend the application to the US of concessions and related obligations of Antigua under the GATS and the Agreement on Trade related aspects of Intellectual Property Rights (TRIPS). Once again, the parties were unable to resolve the matter via negotiations and the matter was referred to an Arbitrator who determined that Antigua could request authorization from the DSB to suspend obligations under the TRIPS Agreement at a level not exceeding US\$21 million annually.<sup>234</sup> This amount was a disappointment for Antigua, compared to the annual value of US\$3.443 billion it had requested.

The Arbitrator's decision concerned the US because it authorized Antigua to suspend WTO concessions with respect to intellectual property rights. The US stated Antigua's pursuit of this solution would establish a harmful precedent for authorizing acts of piracy, counterfeiting, or other forms of intellectual property rights infringement. They also added that it would damage Antigua's intention to lead e-commerce business and would discourage foreign investment (Spicer, 2007).

On May 4, 2007, the US announced its intention to modify its Schedule to exclude gambling and betting services. From the beginning of the dispute the US had claimed that it never intended to include gambling and betting services in its Schedule, and the oversight was realized only after Antigua initiated the subject case. Therefore, in order to bring its GATS commitments into conformity with its public policies the US started the necessary negotiations with the WTO to withdraw its commitment as per GATS Article XXI (Hubert, 2008). Although the US had not implemented the ruling, the solution it sought was also defined in GATS. Therefore the withdrawal would not be interpreted as a dismissal of WTO power or the rulings of the DSB. The path it chose to follow, however, brought along another set of responsibilities as discussed below.

#### **4.6.5. The Aftermath**

In the US, since the beginning of the 2000s, the federal government has taken an active role in the prevention of the provision of Internet gambling services by overseas operators. In order to preserve the internal dynamics of the gambling industry, which is shaped by a variety of state regimes ranging from strictly prohibitionist to very liberal, it has implemented new laws and pursued legal action against some of the most well-known operators. The US

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<sup>234</sup> The Arbitrator determined that the annual level of nullification or impairments of benefits accruing to Antigua was US\$21 million.

government's response to Internet gambling was consistent with its traditional role in supporting the individual state gambling regimes in preventing schemes formulated to evade their jurisdictions. Its unhesitating manner despite the apparent conflicts with some of its international commitments for trade liberalization was also consistent with its stance on the international platform, which has increasingly been described as exceptionalist and in pursuit of a unilateralism that may amount to dismissal of international law and institutions (De Burca, 2009).

Upon the US announcement of the withdrawal of its commitment, 34 countries (including the EU's 27 member states as well as India, Macau, Costa Rica, Canada, Australia, Japan, and Antigua) requested, in accordance with the WTO laws, compensation for this action. The US announced that it had reached settlements with three of the third parties in the dispute, the EU, Canada and Japan. Although the details of the settlement agreements were never disclosed for national security reasons (Brayton, 2008), it was revealed that the countries were provided with service opportunities in the research and development, postal and courier, storage and warehouse and testing and analysis services sectors in the US as compensatory adjustment in the US's WTO services commitments (Hamel, 2007). The settlements with Australia and Costa Rica are known to be similar in context. As of this date, no settlement has been reached with China and India.

The US not only reached settlements with these parties involved in the dispute but also exchanged letters with Australia, Bahrain and Costa Rica in 2004 and with Korea in 2007 that will form integral parts of trade liberalization agreements already in place. The Costa Rica and Korea letters recognize the right of the parties to adopt and maintain any measures in relation to betting and gambling services, in accordance with their laws and regulations. The Korea letter also states that gambling and betting services is neither subject to Chapter XII of GATS regarding cross-border trade in services nor to Chapter XI regarding investment. Australia and Bahrain letters state that the parties agree that gambling and betting regulations will generally fall within the exceptions provided under subparagraphs (a) and (c)(i) of Article XIV of GATS.<sup>235</sup>

The aftermath of *US-Gambling* shown that, in addition to judicial methods, the US has resorted to non-judicial conflict resolution methods, such as private negotiations and

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<sup>235</sup> Free Trade Agreements, USTR, 25 February 2010, Available at: <http://www.ustr.gov/trade-agreements/free-trade-agreements>

communications in order to address the gambling services related conflicts of interest with its trade partners. However, these cannot be thought to be completely independent from the judicial process under the WTO organization as these negotiations have been heavily influenced by the *US-Gambling* decision. Therefore within the WTO context this decision has triggered political processes, through which the US has reached agreements with other possible contestants via communications and negotiations. Through these they have agreed to leave gambling services outside trade liberalization schemes.

#### **4.7.The Gambling topic under Regional Trade Treaties**

The provisions regarding services trade of major regional trade organizations—DR-CAFTA, NAFTA, MERCOSUR and ASEAN<sup>236</sup>—are generally based on the GATS model. So far the provision of Internet gambling services has not appeared as a subject of dispute under these agreements.<sup>237</sup> However, gambling services trade has emerged as an issue in other contexts. For example, DR-CAFTA members the US and Costa Rica have exchanged letters confirming each state's right to apply measures to gambling activities within its national territory.<sup>238</sup> Costa Rica, like Antigua, was another state that had benefited from the establishment of Internet gambling companies; with this agreement the US, likely avoided another high-profile lawsuit. If such a dispute had taken place, it would have been quite likely that the decision benefit from *US-Gambling* given that the DR-CAFTA has adopted the texts of market access and general exceptions clauses of GATS.<sup>239</sup>

MERCOSUR<sup>240</sup> and AFAS<sup>241</sup> have also incorporated the text of the general exceptions clause of GATS (Diaconu, 2010:233-37). Therefore, even though these regional free trade agreements were structured to include all services unless specifically excluded, the exceptions clauses will enable member states to justify their national restrictions for reasons of protecting public morals and maintaining public order.

To the extent that gambling services are covered by these treaties, a common understanding is that they could be exempted under the public morals clause, resulting in an

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<sup>236</sup> European Free Trade Area (EFTA) is another successful regional trade agreement.

<sup>237</sup> Gambling services became the subject of a few disputes and appeared before the EFTA courts. However the disputes that were brought before the EFTA courts are covered in the EU chapter. Please see Section 5.5.3.

<sup>238</sup> Letter on Gambling, US Ministry of Foreign Trade, 28 May 2004

<sup>239</sup> Articles 3 and 21 CAFTA-DR

<sup>240</sup> Article XIII(a)

<sup>241</sup> Article XIV(1)

acknowledgement that national control is the most appropriate method of regulating gambling services.

#### **4.7.1. The Thunderbird Gaming Award**

Among the regional trade agreements covered in this section the only gambling-related dispute has arisen under NAFTA.<sup>242</sup> A publicly held Canadian company, Thunderbird, with its main offices in California, US, wanted to continue its “skill machine” operations in Mexico. These operations had been approved by Mexican authorities but were prohibited by an administrative resolution a year later. The dispute was evaluated in accordance with NAFTA Arbitration proceedings in 2002 and discussed under several topics.<sup>243</sup> Among these, the most relevant issue was the legitimate expectations clause under Chapter 11 of NAFTA, whereby the Arbitral tribunal has decided that in the regulation of the gambling industry, national governments shall have a wide scope of regulatory autonomy to reflect national views on public morals. Therefore, Mexico can permit or prohibit any forms of gambling or change its regulatory policy and shall have a wide discretion as to how it carries out such policies by regulation and administrative conduct.<sup>244</sup> Once this issue had been set forth, the primary issue for the arbitration court to analyse was that of discrimination. The tribunal found that there was no indication of discrimination against foreign establishments either in the wording of the subject Mexican legislation or the application of the same.

In this dispute, the Arbitral tribunal, did not discuss why gambling should be considered an item of public morals nor the meaning of public morals. Neither did the parties to the dispute whether gambling is an item of public morals. As a result, these two issues were confirmed under the NAFTA regime as well: Gambling is a matter of public morals, and with regard to such services NAFTA recognizes the legitimacy of trade restrictions and the diversity of national regimes (Diaconu, 2010: 226).

The case law shows that international economic relations are multifaceted. The restrictions placed on one aspect of a trade item may be challenged based on another commitment as

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<sup>242</sup> Arbitral award in the matter of a NAFTA arbitration under the UNCITRAL Arbitration Rules between: International Thunderbird Gaming Corporation and The United Mexican States, 2006, Arbitral Tribunal of NAFTA

<sup>243</sup> These issues were whether 1. the NAFTA Arbitral Court had jurisdiction on the issue when the Canadian company was only the minority shareholder but the factual controller of the Mexican enterprises; 2. the Mexican government discriminated against the Canadian company (national treatment clause); and 3. there was a violation of minimum standards of treatment. Respectively, the Arbitral Court found that it had jurisdiction, the related Mexican laws were not discriminatory and that there was no violation of minimum standard of treatment.

<sup>244</sup> Paragraph 127 Thunderbird Gaming Award

well. These commitments may complement each other or may trigger various international mechanisms. Nevertheless, the web of international relations is not one dimensional and the majority of the states are connected to each other in a variety of different ways.

#### **4.8.The Implications of US-Gambling**

The provision of the gambling services via digital communication platforms has become a global phenomenon and a threat to the preservation of national gambling policies. Its cross-border trade character led to disputes which triggered supra-national mechanisms established prior to the advent of the Internet, such as WTO's judicial mechanism. The rulings on these disputes have brought to light the judicial approval of state autonomy in regulating areas related to public morals. According to the WTO, the right to regulate is "an inherent power enjoyed by a member state's government, rather than a right bestowed by international treaties such as the WTO Agreement" as stated by the Appellate Body Report in the *China-Publications and Audiovisual Products* dispute.<sup>245</sup> The membership of an international trade organization subjects this right to judicial review as to whether it is exercised consistently with the relevant treaty obligations, whereby the supranational judicial bodies assess this consistency.

The rulings have also emphasized the moral diversity of nations and the inevitable differences among their public policies as grounds for the necessity of the acknowledgement of the right to regulate.<sup>246</sup> This acknowledgement also shows that the WTO member states have been aware of the "potential conflict between trade liberalization and national regulation" (Krajewski, 2003:57). In the three primary examples analysed in this chapter, the *US-Gambling*, *China- Publications and Audiovisual Products* and the *Thunderbird Award* the relevant services and goods were accepted as items impacting public morals.

This broad scope of discretion in determining state specific morals and policies has raised questions as to whether the WTO has stepped back from promoting liberal democratic values. These worries were mostly voiced in relation to *China- Publications and Audiovisual Products* (Qin, 2010) when neither the Panel nor the Appellate Body challenged China's claims that its content review mechanisms are WTO-consistent measures because they reflect

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<sup>245</sup> Please see paragraph 222

<sup>246</sup> Please refer to the GATS Preamble "Recognizing the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulations in different countries, the particular need of developing countries to exercise this right".

the moral and policy concerns of China (Delimatsis, 2010). From a human rights view these measures are widely considered to be violations of the right to freedom of expression, a right recognized under Article 19 of the Universal Declaration of Human Rights.

The WTO's stance had been touted as an indication that it no longer views itself as an agent of a wider scheme that promotes liberal democratic ideals in a way often linked with aspirations for a global constitutionalist order (Qin, 2010, Delimatsis, 2010). A counterargument had been that the same ruling would require China's content review mechanisms to be more transparent, which is a positive step toward freedom of expression, a value promoted as a fundamental feature of liberal democratic systems. In any case, both rulings accommodate the locality and diversity of legal and political regimes, crediting pluralist explanations of the current world order over a constitutionalist ideal that seeks coherence and unity.

In spite of the appeal of preserving state autonomy in as many areas as possible and the ubiquitous scepticism towards trade liberalization, more and more states are participating in a variety of transnational organizations. Whether for political or economic reasons; this participation results in commitments and obligations that limit state autonomy and subject state laws and policies to supranational judicial review. Therefore, the limits on state autonomy are already tightening whether or not exemptions based on reasons of maintenance of public order and protection of public morals provide states the necessary space for preserving control over some fragile areas. Even the US, the state that is the flag holder for trade liberalization and liberalism, has resorted to this clause when it came to gambling, retreating to its exceptionalist cover.

Although such exemptions do not restore regulatory autonomy completely, they are necessary in securing membership of the sovereign states, and they strengthen national regulation against the impact of GATS (Krajewski, 2003: 196). However they also present a challenge: that is to preserve the central purposes of the treaties and not allow exploitation by way of exercising exemption rights. Once the courts determined whether a subject is related to public order or public morals, the second part of the judicial review<sup>247</sup> consists of procedures that provide mechanisms to find this balance. In *US-Gambling* and the *Thunderbird Award*, the

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<sup>247</sup> I.e. in the disputes referenced in this section.



disputes were simplified to problems of non-discrimination.<sup>248</sup> In *China- Publications and Audiovisual Products* the final ruling was based on the necessity test, where the availability of less trade restrictive measures was the determining factor.

The WTO has authority at the supranational level and a judicial rule making mechanism governing the cross-border trade issues of its members. These judicial decisions are legally binding, and the room for deviation is very limited for member states<sup>249</sup> (Krajewski, December 30, 2010). There are considerable differences among the members' moral values and public policies but they have submitted to the principles that set limits on how they can exercise their right to regulate these areas. Therefore, it is safe to presume the existence of an International trade community the members of which share basic values and agree on principles in conducting trade<sup>250</sup>.

As mentioned above the WTO rulings are far from satisfying a constitutionalist ideal. However, the WTO's integration level and organization indicates a structure that requires commitment beyond a basic multilateral trade arrangement among member states. Therefore less strict approaches to pluralism or less ambitious versions of supranational constitutionalism whose definitions sometimes overlap will be able to capture the bigger picture of what is happening in practice more exhaustively.

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<sup>248</sup> Accordingly, WTO members may not implement measures that target and affect only foreign operators and jurisdictions although the same restrictions do not apply to some domestic gambling service providers.

<sup>249</sup> "They therefore cut deeply into national legal and regulatory autonomy. The combination of these two factors creates the legitimacy deficit: On the one hand, the decisions of the international organization must be accepted even if they contradict national laws or policies. On the other hand, the content of these decisions has a profound effect on the national regulatory system. Due to the similarity of these effects, decisions that exercise a high compliance pull and affect domestic regulatory issues can be seen as "functionally equivalent" to supranational decisions"(Krajewski, December 30, 2010).

<sup>250</sup> Even China, a state that does not share these values, has eventually accepted the main principles in order to become a member of the WTO. Since then, China has been extending its global trade and trade partnerships. For updated information please see pp. ix-xii of the Secretariat Report prepared for the WTO 'Trade Policy Review of China' 2012, WT/TPR/S/264

## **5. Provision of Cross-Border Internet Gambling in the EU**

### **5.1.Introduction**

The EU provides a unique setting for observing of a variety of state responses to the emergence of cross-border provision of Internet gambling services, in the context of an economic and political union where a classical understanding of state governance and territory has been undergoing dramatic changes. The combination of high spending power, high Internet penetration rate, familiarity with e-commerce and a fondness towards gambling gave the Internet gambling industry an easy market entrance into Europe in the early 1990s and rapid spread thereafter. A long period of ignorance among EU member states was followed first by prohibition efforts and later by control efforts via a fragmented legislative reformation process on a state-by-state basis starting in 2005.<sup>251</sup> This ongoing reformation process was triggered by a series of publicized confrontations and communications between the gambling industry, the EU member states and the primary EU institutions, the sum of which amounts to a remarkable display of the changing limits, procedures and politics of the legislative and judicial practices in the EU.

The analysis of the developments surrounding Internet gambling services reflects one of the major tensions within the EU. As the EU evolved into an economic, monetary and political union from a customs union, the EU member states voluntarily limited their absolute autonomy in several areas that had previously been considered as falling within their ordinary capacities as sovereign powers. The extent of this otherwise voluntary transition has met with resistance, partly due to increased public attention and national political concerns related to controversial topics such as gambling. The EU legal principles adopted to achieve and protect the single market also impose general restrictions on the types and the extent of trade restrictions the EU member states can implement, even on matters left to their sovereign control. It is on this basis that the legitimacy of the EU member states' restrictions on the Internet gambling services provided by suppliers in other EU member states has also been assessed by EU institutions, primarily the ECJ. This process and the extensive use of Internet in services sector in general led the EU member states to start making some revisions in their initial positions, in order to extend their legislative goals to the Internet platform without breaching EU Laws. Eventually a variety of reformed national gambling laws emerged, each

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<sup>251</sup> Since January 2005, 23 member States and all three EFTA states have notified the European Commission, draft acts and regulations regarding gambling. Please see Working Paper, Accompanying document to the Green Paper on Online Gambling in the Internal Market, 2011, SEC(2011) 321, European Commission, Brussels.

with significant national differences. These efforts toward reformation could be interpreted in part as an indication of the member state's respect for ECJ decisions and their commitment to EU membership requirements. On the other hand their resistance to the harmonization of gambling laws may be proof of the value placed on the remaining sovereign areas. This chapter seeks to analyse this tension with reference to the diversity of systems and values within the EU structure, which is shaped by its ambitions for a more uniform internal market structure.

For purposes of this thesis, the Internet gambling services problem in the EU will be analyzed as an internal market issue. Therefore, the focus is on the provision of Internet gambling services by an operator established in one EU member state to residents of another EU member state. The chapter will start with a brief introduction of gambling practices in the EU followed by a section presenting the governance system of the EU with particular focus on the three principles most relevant to the scope of state authority in regulating areas not harmonized at the EU level. These are the principles of conferral, subsidiarity and proportionality. In the fourth section the goal is to introduce the main principles of the internal market that govern trade among the EU member states, with particular focus on those that have become the basis of the gambling-related rulings of the ECJ, free movement of services, freedom of establishment and free movement of goods. This background is completed with a brief introduction of the administrative procedures utilized in gambling related issues, including the preliminary reference procedures and infringement actions. These sections that present descriptive information are essential to grasp the high integration level of the EU which represents significance within the bigger picture of discussion regarding constitutionalisation and pluralism within. They are also important to understand the structure within which the case-law has been produced.

Other developments have been the adoption of a number of new directives, infringement proceedings initiated by the European Commission and most notably the Green paper launched by the European Commission. The chapter continues with an analysis of the review process of the ECJ and some notes on the economic aspects of gambling. The conclusion of the chapter will consist of an evaluation of all the data presented herein in relation to the changing limits of EU member states in regulating gambling, once an area presumed to remain in absolute state competence.

## 5.2. Gambling in the EU

Gambling has been a part of European leisure culture for centuries. At the time that Internet gambling services emerged, various types of gambling had been legally and widely available throughout Europe<sup>252</sup>. Each EU member state allows some form of lottery run by the state or by strictly monitored monopolies,<sup>253</sup> and a large portion of their revenues has been used to fund charitable purposes.<sup>254</sup> Betting is also very common. It is allowed in all EU member states. In comparison to lotteries, governments have placed softer controls on betting activities. It is quite common among EU member states to grant licences for private operators in this market. Most states require licence applicants to be local companies, while some EU member states have also allowed operators from other EU member states to apply for licences. In Europe sports betting and lotteries have emerged as widely accepted forms of gambling. Casinos are prohibited only in Cyprus.<sup>255</sup> In five of the EU member states casinos are run by state monopolies, while in others non-state operators are provided licenses. These licenses are limited in number and are issued conservatively. Finally, gaming machines are also allowed in most member states. Twenty three of which have allowed machines in public or semi-public places. Four of the EU member states<sup>256</sup> allow them only in casinos. There are restrictions on the number of machines and the size of stakes and prizes (Young and Todd, 2008: 47-8). In general, casinos and casino-style gambling have been less popular and subject to tighter restrictions.<sup>257</sup>

Starting from 1993, the development of ICTs had facilitated the formation of a liberated competitive gambling market from which national operators were mostly, if not completely, absent. The Internet operators benefited from the existing consumer base and merely offered the already existing services<sup>258</sup> on a new platform, arguably a more accessible one. Being

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<sup>252</sup> For more information please see Section 3.2.1.

<sup>253</sup> In 2007 “14 member states allowed non-state monopolies and/or operators to run lotteries. Of these, 7 allow private operators to run only small-scale lotteries and/or bingo games.” (Young and Todd, 2008: 47)

<sup>254</sup> Please see ‘The History of Gaming’ 2010 European Lotteries Available: [https://www.european-lotteries.org/pdf/history\\_of\\_gaming.pdf](https://www.european-lotteries.org/pdf/history_of_gaming.pdf) [Accessed 27 October 2010].

<sup>255</sup> Ireland also prohibits establishment of casinos but allows private clubs to offer such services to its members, which in effect operates in a similar fashion to casinos.

<sup>256</sup> These are Greece, Latvia, Portugal and Luxembourg.

<sup>257</sup> Please see Figure: 2 Section 5.2.1.

<sup>258</sup> As also pointed out in the Green Paper on Online Gambling the variety of games offered via the online platform is similar, comprised of sports betting, casino games, poker, state lotteries and bingo. The gaming machines do not exist as an independent product in the Internet gambling market as they are provided at online casinos and do not appear at other retail websites under a different license, as they do in the land-based market. Also, in the Internet gambling market poker has emerged as a separate and very strong product, and therefore the revenues generated through it are often calculated separately. Poker is considered different from other casino

able to provide services without establishing their businesses on the receiving end provided them the opportunity to choose among the less restrictive of legal regimes. This newly formed market space rapidly reached a very large customer base and earned high revenues, before the EU institutions or the EU member states had started addressing the matter. Even though the EU member states' sole authority on the provision of gambling services was under threat, their initial response was to turn a blind eye. It was only years after these services became very popular that most EU member states claimed these services to be unlawful according to existing laws and started implementing measures to impede access to their citizens.<sup>259</sup> This reaction received substantial public support.

The public discomfort was caused by the Internet gambling service providers' ease in taking advantage of the new media to evade local laws and its availability without constraints of travel, time and space. As a result of years of experience, as also observed by Fijnaut and Hörnle, these evaded national laws have been largely accepted as the sole effective way of minimizing impact while providing protection for vulnerable members of society. Indeed, as a consequence of adopting this harm-based approach, the public policy objectives the EU member states intend to protect are mostly similar. Variations are due to differences in social values and social policy concerns.

In response to negative reactions and in an attempt to establish their legitimacy and protect their businesses, Internet gambling companies started challenging the limitations imposed on their activities, which have proved to be very lucrative, by pursuing the legal paths available to them. They applied for local licences, engaged in lobbying efforts, filed complaints at the European Commission and filed lawsuits against the EU Member States with restrictive national legislations, as explained in further detail in Section 5.5, where a timeline of events is provided. Their primary position has been that their practice is legitimate and so they should be granted the privileges any other European service provider enjoys.<sup>260</sup>

Therefore, the Internet gambling industry has embarked on a mission to alter an established system which has gained the hard-earned approval of the society and has been economically beneficial for the EU member states and the good causes it has been supporting. The moral aspect of the provision of this service has been questionable to begin with, at varying degrees

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games because it is a peer-to-peer game and is not played against the house/machine. It is often argued that poker should be considered a skill game, rather than a game of chance.

<sup>259</sup> Please see sections 5.4. and 5.5.

<sup>260</sup> Please Executive Summary of SICL Report.

in different states, adding political value to conservative approaches. The process of change had started, whether or not it was going in the direction intended by Internet gambling companies. That change may not have been possible unless the states targeted were not a part of the EU, an economic and political union. Their obligations that arise from this membership have led to closer examination of the EU member states' gambling regimes, the regimes' suitability for the stated policy goals and their overall permissibility under Articles 56-57 and 49 of the Treaty on the Functioning of the European Union (TFEU),<sup>261</sup> which protect the freedom to provide services and freedom of establishment among the EU member states.

### **5.2.1. Economic Influences in Policy Making**

According to the relevant ECJ case-law, the EU member states may pursue economic goals, such as increasing revenues, via their gambling policies. The revenues generated are usually allocated to funding public projects or other good causes. However, the ECJ will not take the economic justifications of the EU member states into consideration with regard to their restrictive measures on freedom to provide services and, where relevant, on freedom of establishment. However, the existence of such economic goals would not hinder the legitimacy of other measures that could justify the restriction, such as protection of public policy, public security or public health or other objective justifications defined by the ECJ, such as prevention of high risk of crime or fraud, and avoiding an incitement to spend which may have damaging individual and social consequences. Within this framework, the economic significance of the gambling market was downplayed in the gambling-related disputes brought before the ECJ. But its influence in policy making is evident in the significant revenues that this industry is able to generate.

Despite having been left somewhat behind the scenes in the gambling debate in Europe, financial motives have definitely been among the primary driving forces for service providers, whether private or public, if not the most important one. Financial motives have also been an obstacle to liberalization and/or the harmonization of the gambling market. It has long been believed that only under strictly controlled national markets is it possible to ensure that a high percentage of revenues are allocated to charitable, sports and cultural purposes or to increase tax revenues (Hörnle, 2010, Fijnaut, 2008b). Any changes to the market structure are likely to cause complicated taxation problems, whereas few of the states

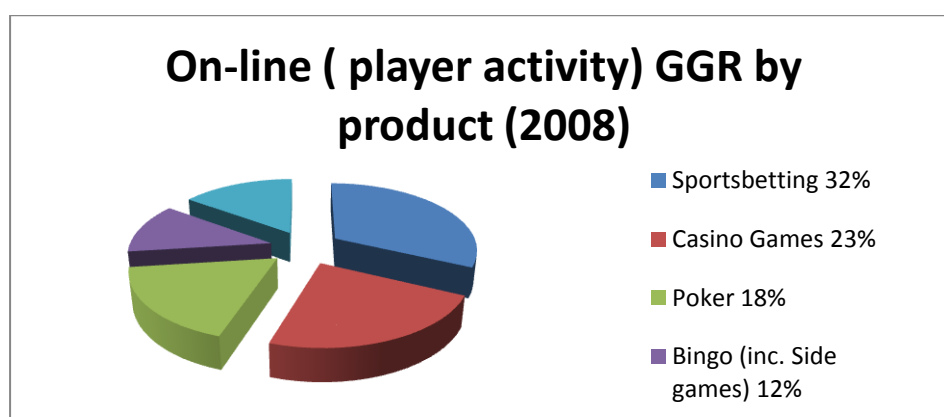
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<sup>261</sup> Previously Article 49-50 and 43 of the EC Treaty.

would be content with the outcome. The experiences of the EU member states which have liberalized their gambling market and opened them to competition such as UK, Malta, France and Italy will benefit other in formulating appropriate taxation methods. Given its significance, it is necessary to acquire a realistic picture of the size of this sector and its financial value in order to understand what is at stake.

Institutionalized gambling generates significantly high revenues in short periods with minimal investment requirements. According to an SICL report in 2003, the GGR for the commercial Internet gambling market was more than €51.5 billion, where remote gambling accounted for roughly 5% of the total. According to H2 Gambling Capital, a prominent supplier of gambling market intelligence/data, non-remote GGR grew to €70.5 Billion in 2009 and is expected to grow to € 76.5 Billion GGR in 2012.<sup>262</sup> A comparison with the EU budget in 2009, which was €116 Billion, illustrates the magnitude of the gambling market.

The effects of gambling policies are reflected in the ratio of GGRs generated by each type of game. The more accepted forms of gambling generate higher revenues. In 2003, lotteries generated almost half of GGRs generated in the EU, followed by gaming machines, betting services, casinos and bingo services. The comparative ratio of the revenues generated by the Internet games is slightly different from those of their land-based counterparts. According to Green Paper on Online Gambling in the Internal Market<sup>263</sup>, the breakdown in GGRs was as follows:



**Figure 2**

The GGR for on-line gambling market was in excess of €6,16 billion which accounting for 7,5% of the GGR for the overall European gambling market, estimated to be around €75,9

<sup>262</sup> The same study estimated that non-remote gambling will have 86.2% of the market in 2012.

<sup>263</sup> European Commission, “Green paper on online gambling in the Internal Market” SEC (2011) 321, 24 March 2011

billion.<sup>264</sup> The increase in the revenues generated the land-based service providers have been in part a result of marketing campaigns that have become more and more aggressive. The gambling products offered within the national markets have become very diverse, as well.<sup>265</sup>

### **5.3.The Governance system of the EU**

The most important differences between the EU and other international organizations, such as the WTO, the UN or regional trade organizations such as NAFTA or CAFTA-DR, are its higher integration level and its governance structure. The unprecedented integration process of the EU has been an exceptional unit of analysis especially for lawyers, along with many other researchers in various areas, including economists, sociologists and political scientists. In an attempt to explain the effects of the integration process on the once centralised territorial authorities of the member states, the multi-level governance theory was created.<sup>266</sup> This theory captures the involvement of the multiple actors<sup>267</sup> in the policy and decision making in the EU, in a way that has implications for the role and authority of the EU member states. The theory's descriptive strength in explaining the unique governance system of the EU serves the purpose of this section which is to understand the mechanics behind the EU response to Internet gambling-related issues and the commitments of the EU member states to free movement that lie at the heart of the debate.

The multilevel governance theory emphasizes that the states no longer monopolize European level policymaking and/or the interests at the national level even if they are still important; perhaps even the most important components of the EU structure. However, the member states have recognized that the independent role of the European level actors and the EU governance mechanism have allowed sub-national actors to act independently of the states at the EU level as well as the national level, in European policymaking. Therefore, the EU and the sub-national actors<sup>268</sup> are linked independently of the states. Consequently, the states “no longer provide the sole interface between supranational and sub national arenas and they share rather than monopolize control over many activities that take place in their respective territories (Marks, Hooghe and Blank, 1996)”.

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<sup>264</sup> European Commission Staff “Working Paper, Accompanying document to the Green Paper on Online Gambling in the Internal Market” (2011), Brussels, 24.3.2011, SEC(2011) 321 final.

<sup>265</sup> Based on these facts and aggressive marketing campaigns, the EU member states have been criticised for allowing their gambling policies to focus more on maximising profits than serving public policy objectives. (Fijnaut, 2008a, Arendts, 2007).

<sup>266</sup> It was introduced for the first time by Hooghe and Marks (1996).

<sup>267</sup> I.e., primarily the European actors, state actors and non-state actors.

<sup>268</sup> This includes local and regional authorities.



This theory has received wide acceptance, whereas the Committee of the Regions<sup>269</sup> has adopted a white paper with the aim of enhancing multi-level governance in the EU (Van den Brande and Delebarre, 2009).<sup>270</sup>

Direct effect and supremacy are the two principles of the EU that are significant in this respect. Via application of both principles, EU laws can be and are used to make claims before domestic courts and override domestic law. According to the direct effect principle, introduced by the ECJ,<sup>271</sup> the EU citizens could demand the enforcement of EU regulations, directives, treaty provisions and decisions in their own member state courts, regardless of whether national laws had been introduced to implement them.<sup>272</sup> The supremacy principle, on the other hand, means that the provisions of the EU law that have direct effect will take precedence over national laws.<sup>273</sup> Via the implementation of these principles, the ECJ has ensured that EU citizens and the other sub-national actors have direct access to EU laws and that the national courts enforce them (Weiler, 1991). This result is a uniform and effective application of EU laws across the EU member states.

This multi-level policy and decision-making would not have been possible in a typical international supranational economic organization where the states largely preserve control and decision-making power over domestic and international politics. The higher integration level of the EU makes this model a workable governance model. A prominent EU scholar, Catherine Barnard, referred to the seven stages of integration levels, previously defined by economics scholars,<sup>274</sup> in order to identify the integration level of the EU. According to this classification, the first level of integration is that of a free trade area, and the most integrated

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<sup>269</sup> It is the EU's Assembly of Regional and Local Representatives, an advisory committee which has been given an extended role under the Lisbon Treaty. The EP and the Council of the EU must consult this committee before legislating certain areas, including but not limited to health, social policy, transport and so on. Please see Articles 80(2), 116, 127, 144, 230 Lisbon Treaty

<sup>270</sup> Also the OECD interpreted the model in terms of how "the exercise of authority and the various dimensions of relations across levels of government" encouraged a multilevel governance model among its members. Please see 'Multi-level Governance' OECD, 2012. Available at <http://www.oecd.org/gov/regional-policy/multi-levelgovernance.htm>.

<sup>271</sup> It was introduced for the first time in *van Gend en Loos* (Case C-26/62 *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen van Gend en Loos* [1963] ECR I-00001 Judgement of 5 February 1963.

<sup>272</sup> In order to do so the subject provision must be sufficiently clear and precisely stated; must be unconditional and not dependent on any other legal provision and must confer a specific right upon which a citizen can base a claim.

<sup>273</sup> Please see Declaration 17 Annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007. (9.5.2008 Official Journal of the European Union C 115/335)

<sup>274</sup> The stages are: 1. Free trade Area, 2. Customs Union 3. Common Market 4. Monetary Union 5. Economic Union 6. Political Union 7. Full Union. The stages she had pointed out were primarily defined by Balassa (1961).

level is identified as a full union. In her review she had found that, with the adoption of the Lisbon Treaty, the EU has been moving from an economic union<sup>275</sup> to a political union. Political union, one step below full union, is defined as an economic union with a central authority that not only sets monetary and fiscal policies, foreign and security politics. but is also responsible to a central parliament with the sovereignty of a nation's government (Barnard, 2010:8-14). Her evaluation is a comprehensive reflection of present-day treaty objectives and the governing mechanisms of the EU, especially after the Lisbon Treaty.

The participation in a political union brings increased responsibilities and imposes substantial limitations on once autonomous EU member states. It is in this setting that this chapter will analyze the EU member state's right to regulate gambling as a public policy item.

### **5.3.1. Principles of the EU**

In addition to the direct effect and supremacy principle, the principles of conferral, supremacy and proportionality are also defining features of the governance system of the EU. While the direct effect and supremacy principles establish the power of the EU legislation over those of the EU member states, the conferral principle<sup>276</sup> sets the limits of this power, the use of which is regulated by the principles of subsidiarity<sup>277</sup> and proportionality<sup>278</sup>.

In accordance with the subsidiarity principle the priority in regulating any area is left to the member state unless it can be clearly established that there is a need to act at the EU level. This principle guides all decision-making processes in which the areas that should be regulated by the EU and those that shall be retained by the EU member states. Gambling services were discussed in the scope of this principle in 1992 at the EU Summit in Edinburgh, where it was decided that they were best left to the control of the EU member states.<sup>279</sup> There

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<sup>275</sup> It is very simply characterized by a monetary union and a single monetary and a fiscal policy controlled by a central authority.

<sup>276</sup> Article 5(2) of the Treaty on the European Union (TEU) (as amended by the Treaty of Lisbon) governs this principle: "Under the principle of conferral, the Union shall act only within the limits of the competencies conferred upon it by the EU member states in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

<sup>277</sup> It is articulated in Article 5(3) of the TEU (as amended by the Treaty of Lisbon):

"Under the principle of subsidiarity, in all areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional or local level, but can rather by reason of the scale or effects of the proposed action, be better achieved at Union level.....National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol"

<sup>278</sup> The proportionality principle concerns the limits of the exercise of powers by the EU.<sup>278</sup> In accordance with this principle, the European Commission must justify the relevance of any gambling related proposals, such as harmonization of laws, it will have to show that harmonization is necessary to achieve objectives of the treaties.

<sup>279</sup> Please see Article 3 of Conclusions of the Presidency, Annex 2 Part A, in 1992.

are no objective assessment criteria as to how such a decision is made because it is often very political. National parliaments interpret this principle and the proportionality principle in very different ways depending on their own historical, political and social experiences.<sup>280</sup> All this being the case, in light of the new challenges posed by the use of Internet and other digital communication platforms in provision of the gambling services; in 2011 the European Commission took the first step of seeing whether the circumstances and political inclinations of the states had changed. An extensive public consultation<sup>281</sup> was held in order to discern whether further cooperation at the EU level would help member states to more effectively achieve the objectives of their gambling policies.<sup>282</sup>

### **5.3.2. The primary treaty obligations**

On the path leading to the formation of a political union, the economic cooperation goals of the EU member states have been the strongest driving force<sup>283</sup> from the beginning. It was only after the single market goals were achieved that certain political, social, and economic rights became an integral part of EU treaties.<sup>284</sup> The strength of the internal market is still fundamental for the continued success of the EU. Therefore, the principles that protect it are safeguards to protect not only the internal market, but the EU as the unique supranational structure it has become. The cornerstones of the internal market are the four freedoms: Free movement of goods, persons, services and capital. Among these, the free movement of services<sup>285</sup> has been the freedom central to ECJ rulings in gambling-related disputes, with the free movement of goods also invoked in a few. In this section, the provisions that protect these freedoms will first be introduced. These TFEU provisions take direct effect, meaning that EU member states are obliged to ensure their national laws do not conflict with them.

#### *Article 56 Free movement of services*

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<sup>280</sup> Please see pp. 5-11 of the 33rd Report ‘Subsidiarity, National Parliaments and the Lisbon Treaty’ of UK House of Commons European Scrutiny Committee in 21 October 2008.

<sup>281</sup> Green Paper on Online Gambling.

<sup>282</sup> Please see Working Paper Accompanying Green Paper on Online Gambling.

<sup>283</sup> The former names of the union reflect the changing structure of the EU from a customs union to a political union: the European Coal and Steel Community (“ECSC”, the Treaty of Paris of 18 April 1951); the European Economic Community (“EEC”, the Treaty of Rome of 25 March 1957); the Single European Act of 1 July 1987; the TEU of 1 November 1993; and lastly the Treaty of Lisbon of 1 December 2009 (in 1999 the single currency Euro was introduced).

<sup>284</sup> The Charter of Fundamental Rights of the EU was drafted by the European Convention in 1999. The EP, the European Council and the European Commission signed and proclaimed it on 7 December 2000. But its legal status was unclear until it became a part of the Lisbon Treaty in 2009.

<sup>285</sup> The freedom of establishment has also been invoked. It is often not mentioned as one of the fundamental freedoms but is considered together with the freedom to provide services.

The provisions regarding the free movement of services aim to achieve free circulation of services among EU member states and protect a range of interests not limited to the service providers and the states at the hosting and receiving end of the service, but extending also to the recipients of the services. It should also be noted that free movement of services protects a range of interests not limited to the service providers and the states at the hosting and receiving end of the service, but extending also to the recipients of the services.<sup>286</sup>

#### *Article 49 Freedom of establishment*

The freedom of establishment and the freedom to provide services complement each other, given that it is often the case that a self-employed person or a company establishes itself in another EU member state to provide services. Thus, in disputes regarding freedom of establishment the two freedoms are often invoked together. Such freedom, in practice, protects the rights of self-employed persons and companies of one EU member state to set up and “pursue an economic activity through a fixed establishment in another EU member state for an indefinite period”.<sup>287</sup>

#### *Article 34 Free Movement of Goods: Prohibition of Quantitative Restrictions between Member States*

The free movement of goods is another fundamental freedom of the EU protected under Article 34 TFEU.<sup>288</sup> Early on in gambling-related case law, the ECJ decided that traded items related to gambling activities are not ends in themselves and therefore cannot be considered independently of the gambling activity they relate to, which is a service.<sup>289</sup> Therefore, this article had limited application for gambling-related case law. It was invoked in several cases but the ECJ applied this article only in *Commission v. Greece*<sup>290</sup> with regard to trade of

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<sup>286</sup> “Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended. The EP and the Council, acting in accordance with the ordinary legislative procedure, may extend the provisions of the Chapter to nationals of a third country who provide services and who are established within the Union.”

<sup>287</sup> Please see paragraph 20 in Case C-221/89 *Factortame II* [1991] ECR I-3905.

<sup>288</sup> The subject of free trade of goods is actually covered from Article 28 to Article 37, whereas the initial chapters relate to the customs union and customs cooperation among the states.

<sup>289</sup> “The activity pursued by the defendants in the main proceedings appears, admittedly, to be limited to sending advertisements and application forms, and possibly tickets, on behalf of a lottery operator, SKL. However, those activities are only specific steps in the organization or operation of a lottery and cannot, under the Treaty, be considered independently of the lottery to which they relate. The importation and distribution of objects are not ends in themselves. Their sole purpose is to enable residents of the Member States where those objects are imported and distributed to participate in the lottery.” Paragraph 22 of *Schindler*

<sup>290</sup> Case C-65/05 *Commission v Greece* ECR [2006] I-10341.

gaming machines used for amusement and recreational purposes only and not for games of chance.<sup>291</sup>

### **5.3.3. Express Derogations and Justifications**

The EU member states are obligation to comply with the primary treaty obligations is not absolute as the TFEU also recognizes several grounds for justification of national restrictions that may impede freedom of establishment and free movement of services, as referenced in Article 52 and Article 62. The list is limited, consisting of public policy, public security and public health. The ECJ, however, recognized additional grounds for justification of indirectly discriminatory measures on grounds of nationality. These justifications have received several different names such as mandatory requirements, public interest requirements, objective justifications, and so on.

As for free movement of goods, Article 36 lays down the grounds for justification of national restrictions. This list is more detailed, consisting of public morals, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.

### **5.3.4. Secondary EU Legislation**

Gambling services had been specifically excluded from some widely anticipated directives, especially the E-Commerce Directive<sup>292</sup> and the Services Directive<sup>293</sup> at a critical time when ECJ was busy with high profile gambling disputes.<sup>294</sup> These exclusions revealed the view of the EP and the Council of the European Union, that gambling is a special sort of service that is best regulated at national level. Indeed, in paragraph 25 of the Services Directive, the reason provided for the exclusion was that the specific nature of the gambling activities necessitated implementation of nation-specific public policies and consumer protection by the EU member states themselves. These moves have ensured the worrisome majority of the EU member states that gambling services will not be a part of the harmonization process and

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<sup>291</sup> The other cases were *Schindler* and *Anomar* (Case C-6/01 *Anomar v. Portugal* [2003] ECR I-08621).

<sup>292</sup> Directive 2000/31/EC OJ L178 pp. 1-16 of 17 July 2000.

<sup>293</sup> Directive 2006/123/EC pp. 36–68 OJ L 376 27 December 2006.

<sup>294</sup> In Article 1(5)(d) gambling activities are defined as “gambling activities which involve wagering a stake with monetary value in games of chance, including lotteries and betting transactions.”, whereas paragraph 16 of the preamble excludes “promotional competitions or games where purpose is to encourage the sale of goods or services and where payments, if they arise, serve only to acquire the promoted goods or services.”

disappointed the ones supporting liberalization and/or harmonization one more time after the E-Commerce Directive, such as UK and Malta.

Indeed, if the country of origin principle introduced in the E-Commerce Directive that enabled the information society service providers to comply only with the law of the place of their establishment applied to gambling services the course of the future Internet gambling-services-related disputes and the sector itself would have changed dramatically by allowing service providers to establish themselves in the more liberal jurisdictions and provide their services freely to citizens of other EU member states (Hörnle and Zammit, 2010: 143). At the time, given the highly political nature of these two institutions it was very unlikely for the EP and the Council of the European Union to take a step toward regulation of cross-border provision of gambling services at the risk of bad publicity.

The changing atmosphere surrounding Internet gambling and EU member state attitudes can be observed in later developments. Initially the emphasis had been on the diversity of national regimes and the right to remain so. Then, more and more, the expectation turned to cooperation among EU member states. For example in paragraph 30 of Report on Internet gambling in the Internal Market<sup>295</sup> cooperation among EU member states to agree on Europe-wide gambling-specific consumer protection measures is highly anticipated whereas gambling services had been left outside the scope of Consumer Rights Directive.<sup>296</sup> There are also other directives that regulate various aspects of services trade and are also applicable to Internet gambling services. Among them are Anti-Money Laundering Directive<sup>297</sup>, Data Processing Directive<sup>298</sup>, E-Privacy Directive<sup>299</sup>, Unfair Commercial Practices Directive<sup>300</sup> and Audio-visual Services Directive<sup>301</sup>.

#### **5.4. Administrative processes in relation to national gambling regulations**

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<sup>295</sup> European Parliament resolution of 15 November 2011 on online gambling in the Internal Market (2011/2084(INI))

<sup>296</sup> Directive 2011/83/EU OJ L 304 PP. 64-88 22 November 2011.

<sup>297</sup> Article 2 of Directive 2005/60/EC OJ L309 pp. 15–36 of 25 November 2005 (as amended by Directive 2008/20/EC OJ L76 pp. 46-47 of 19 March 2008)

<sup>298</sup> Directive 2002/58/EC OJ L 201 pp. 37–47 31 July 2002 (Amended by Directive 2006/24/EC OJ L 105, 13.4.2006, p. 54–63 and Directive 2009/136/EC OJ L 337 pp. 11–36 18 December 2009)

<sup>299</sup> Directive 2002/58/EC OJ L 201 pp. 37–47 of 31 July 2002 (amended by Directive 2009/136/EC OJ L 337 pp. 11–36 of 18 December 2009)

<sup>300</sup> Directive 2005/29/EC OJ L 149 pp. 22–39 of 11 June 2005.

<sup>301</sup> Directive 2010/13/EU OJ L 95 pp. 1-24 of 15 April 2010. Article 22 this directive excludes all gambling services for which the audiovisual content is merely a supplementary feature of the main purpose. In this context games of chance and online games are excluded from the scope of this directive, whereas broadcasts devoted to games of chance are not.

The restrictive measures placed on gambling trade by the EU member states came up as a topic for the first time as a part of the single market debate independently of the developments in the digital communication platforms and the emergence of the Internet gambling industry. In 1991, around the same time that the Internet gambling industry was just starting to become active, the European Commission requested a study of the then-current status of the gambling market.<sup>302</sup> It was rumoured that the European Commission was planning to propose the harmonization of the European gambling market (Vlaemminck and De Wael, 2003). However, the European Council acted before any proposal could be made. At the EU Summit in 1992 in Edinburgh, the matter was evaluated in the context of the subsidiarity principle and it was decided that gambling should remain a subject of national regulation.<sup>303</sup>

As a result, the European Commission put its plans for harmonization on hold but left the door open for reconsideration of its position, in case circumstances changes due to unforeseeable trends (Verbiest and Keuleers, 2003). On this occasion the interests represented by the European Commission, whose role is to represent and uphold the interests of EU, differed from those of individual EU member states, whose collective decision had been represented at the Council of Ministers. Two years after the EU Summit in Edinburgh, European Commission started to issue infringement actions and initial gambling-related disputes and the decisions of the ECJ started to emerge. As a result, EU member states have realized for the first time that their gambling laws are subject to supranational review.

#### *Infringement Proceedings*<sup>304</sup>

In relation to their gambling regulations, the European Commission has initiated infringement proceedings to Germany, Italy, the Netherlands, France, Greece, Austria, and Sweden from 2006 to 2008, upon complaints from service providers. In relation to their sports betting regulations infringement proceedings had been initiated to the Netherlands, Germany,

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<sup>302</sup> This working document of the EU Commission was the first Europe wide study that had focused on national gambling regulations, Gambling in the single market - A study of the current legal and market situation. Volume I: Executive summary and pan-European Community market review, June 1991.

<sup>303</sup> Please see Article 3 of Conclusions of the Presidency, Annex 2 Part A, in 1992.

<sup>304</sup> The EU member states are responsible for implementing the EU Laws and regulations into their national legal systems by a given deadline in order to achieve coherence among the legal rules and systems within the EU. The European Commission is responsible for ensuring that they have done so, per Article 258 of TFEU. Accordingly, the European Commission decides whether to launch an infringement action based on a complaint or on its own initiative. Initially the European Commission follows an administrative procedure of delivering reasoned opinions on the matter. If an EU member state fails to comply with the opinion (via action or omission) within the given period, the European Commission may pursue an action for non-compliance and/or bring the issue before the ECJ.

Hungary, Finland, Denmark, Sweden and France<sup>305</sup>. The proceedings against Greece, Spain and Italy developed into lawsuits.<sup>306</sup> Later the proceeding against Italy and France closed when they decided to remove the subject trade barriers.

In these infringement proceedings European Commission repeatedly acknowledged the sensitivity of the subject and stated that the infringement proceedings should in no way be interpreted as a step towards liberalisation of the gambling market or as related to the existence of monopolies. The European Commission emphasised that its purpose was to make sure that the restrictions applied by EU member states were compatible with Article 56 of the TFEU related to the free movement of services. It also referred to the ECJ decisions in similar cases where it was emphasised that such restrictions must be necessary, proportionate and non-discriminatory and also consistent and systematic in how they are applied in order to be compatible with EU Laws.<sup>307</sup> The European Commission was later criticized by the Committee on Internal Market and Consumer Protection for not making effective progress with these infringement proceedings and was called to investigate further inconsistencies of national legislation under the TFEU provisions.<sup>308</sup> In fact concerns with the rate of compliance and effectiveness of enforcement mechanisms of the infringement proceeding have been raised before in other circumstances, the statistical studies have shown that the system has been more effective than what sceptics have thought (Sweet, 2010, Börzel, 2001).

### **5.5.Judicial Processes in relation to national gambling regulations**

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<sup>305</sup> “04.04.2006: Commission inquires into restrictions on sports betting services in Denmark, Finland, Germany, Hungary, Italy, the Netherlands and Sweden (IP/06/436); 12.10.2006: Commission inquires into restrictions on the provision of certain gambling services in Austria, France and Italy (IP/2006/1362); 21.03.2007: Commission acts to remove obstacles to provision of sports betting services in Denmark, Finland and Hungary (IP/07/360); 27.06.2007: Commission acts to remove obstacles to the provision of sports betting services in France, Greece and Sweden (IP/07/909); 31.01.2008: Commission inquires into restrictions on the provision of certain gambling services in Sweden (IP/08/118) & Commission inquires into restrictions on gambling services in Germany (IP/08/119); 28.02.2008: Commission acts to remove obstacles to provision of gambling services in Greece and the Netherlands (IP/08/330); 05.05.2010: Internet gambling: barriers removed in Italy (IP/10/504); 24.11.2010: Commission welcomes France’s decision to open its gambling market and closes infringement procedure (IP/10/1597)”.

<sup>306</sup> Among them there are Case C-65/05, *Commission v. Greece*, [2006] ECR I-10341, Case C-153/08, *Commission of the European Communities v. Kingdom of Spain*, [2009] ECR I-09735, Case C-260/04, *Commission of the European Communities v. Italian Republic* [2007] ECR-I 07083 More information can be found in Section 5.5.

<sup>307</sup> Please see EU Press Release Free movement of services: Commission inquires into restrictions on the provision of certain gambling services in Austria, France and Italy, IP/06/1362 on 12 October 2006, Brussels.

<sup>308</sup> Please see paragraph 11 Opinion of the Committee on Legal Affairs for the Committee on the Internal Market and Consumer Protection on online gambling in the internal market (2012/2322(INI)) in 29.4.2013. Also Please see paragraph 30 in Report on the Online Gambling Market 2013 Committee on the internal Market and Consumer Protection A7-0218/2013 (2012/2322(INI)) on 11 June 2013.



The obligation to acknowledge of ECJ decisions by national courts has been instrumental in constitutionalisation of the EU (Tridimas, 2002, Goldoni, 2010, Halberstam, 2010). ECJ performs its role to ensure the application and uniform interpretation of EU law in cooperation with the courts and tribunals of the EU member states as per Article 267 TFEU<sup>309</sup>. In the gambling related cases the ECJ has managed to acknowledge that gambling regimes may remain particular to each nation while retaining the coherence of the overall EU trading system. In order to do so it has managed to employ effective review mechanisms to test legitimacy of national trade restrictions and their proportionality to decide whether they would be permissible as per exceptions and derogations provisions. The case law discussed below provides examples of ECJ's decisions and decision making processes in a variety of circumstances. These will be instrumental in revealing the role of supranational judicial process in changing policies and also legislations of the EU member states.

### 5.5.1. Early case law

There were six rulings from 1994 to 2006. Among these, the most significant are *Schindler*<sup>310</sup> and *Gambelli*<sup>311</sup>. In its *Schindler* decision, ECJ defined applicable provisions and principles to cross-border provision of gambling services in EU Laws. However, it is *Gambelli*, that is considered a benchmark case the review standards of which had been followed in similar subsequent cases. This early case-law forms the basis for future cases regarding provision of Internet gambling services; although in none of the six cases did the customers directly reach to gambling service providers via the Internet. The issues at dispute were mostly the trade restrictions placed on gambling operations by the EU member states and their implications for other operators established in other EU member states.<sup>312</sup> In each new case, the suitability of the national restrictions under the EU Laws was put to test and the limits of national autonomy in regulating their public morals areas were determined.

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<sup>309</sup> Accordingly any national court can refer to the ECJ for a preliminary ruling, whereas these rulings will deal only with the elements of the case related to EU law, and the national court will remain competent for the original case. The ECJ can refuse to answer a question on the basis of competence but not on the basis of relevance or timeliness to the original case. The preliminary rulings issued by the ECJ have binding effect not only on the national court that has requested it but on all other national courts of the EU member states. This procedure has been utilized in most gambling-related case law which will be analyzed in the next section whereas the ECJ has had to interpret relevant EU laws, mainly free movement of services and exceptions and derogations clauses pursuant a variety of national circumstances

<sup>310</sup> Case C-275/92 *HM Customs and excise v Schindler* [1994] ECR I-01039.

<sup>311</sup> Case C-243/01 *Criminal proceedings against Piergiorgio Gambelli and Others* [2003] ECR I-13031. In *Gambelli*, a UK betting company was linked to its Italian agencies via the Internet, while in the other five cases Internet was not used.

<sup>312</sup> To the residents of the EU member states which have adopted restrictive regimes.

In *Schindler*<sup>313</sup>, the first decision regarding cross-border provision of gambling services, and the ECJ, for the first time:

- i. defined gambling as an economic activity;<sup>314</sup>
- ii. defined gambling as a service;
- iii. defined, not just lotteries but “gambling” in general as an activity of a peculiar nature with moral, religious and cultural aspects;<sup>315</sup>
- iv. stated that it is not for the ECJ to assess the legislation of an EU member state from a moral point of view;
- v. found that national restrictions that prohibit the cross-border provision of gambling services are an obstacle to the freedom to provide services, whether or not they are indistinctly applicable<sup>316</sup>;
- vi. found that the protection of consumers and the maintenance of order in society justify the indistinctly applicable restrictions.

The ECJ added that, even if it was relevant to the national policies, the use of revenues generated by the national lotteries for public projects or other good causes and other reasons of economic nature would not justify the breach of Article 56 TFEU.<sup>317</sup> However, because the subject legislations are not discriminatory on the basis of nationality, the restrictions imposed by it could be justified via express derogations and/or overriding reasons in the public interest. The ECJ then accepted all the justifications<sup>318</sup> advanced by the UK government without question<sup>319</sup>. The proportionality of the measures, a key review standard in future cases, which was introduced in the *Gambelli* case, was not discussed.

*Läära*<sup>320</sup> was the ECJ decision that followed *Schindler*. In *Läära* the ECJ added to its previous jurisprudence a discussion of the proportionality of the measures and ruled that the comparison of restrictions applied by the exporting EU member states to the importing ones

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<sup>313</sup> This case had to do with the importation into the UK of lottery tickets, application forms and advertising by a German lottery operator in breach of national UK legislation.

<sup>314</sup> “Finally, neither the chance character of the winnings, as consideration for the payment received by the operator, nor the fact that, although lotteries are operated with a view to profit, participation in them may be recreational, nor even the fact that profits arising from a lottery may generally only be allocated in the public interest, prevents lottery activities from having an economic nature.” Please see Paragraph 4 of the Summary of *Schindler*.

<sup>315</sup> However, lotteries could not be classified as activities of harmful nature (ie. activities involving illegal products) given that they are commonly organized in member states. Please see paragraph 32 of *Schindler*.

<sup>316</sup> The subject UK national legislation which restricted provision of lottery services by the operators of the other EU member states was ruled as a restriction on freedom to provide services and therefore an infringement of Article 56 TFEU. Please see the Summary, *Schindler*.

<sup>317</sup> Please see Paragraph 60, *Schindler*.

<sup>318</sup> These were “to prevent crime and to ensure that gambler would be treated honestly, to avoid stimulating demand in the gambling sector which has damaging social consequences when taken to access and to ensure that lotteries could not be operated for personal and commercial profit but solely for charitable, sporting or cultural purposes.” Please see paragraph 57 of *Schindler*.

<sup>319</sup> Although the UK government had acted in contradiction to its claims, by passing a law to create a national lottery before the ruling was issued.

<sup>320</sup> Case C-124/97 *Läära* [1999] ECR I-6067

was not appropriate and that EU member states may choose different systems and levels of protection, including monopolies.<sup>321</sup> Therefore, proportionality test must be conducted between the objectives of the EU member state applying the measures and the level of protection they are intend to provide.<sup>322</sup> The ECJ adopted a similar review process in its *Zenatti*<sup>323</sup> decision and confirmed the wide margin of discretion accorded to EU member states.<sup>324</sup> These two decisions reminded the EU member states that, while it is their right to determine their own gambling policies and the appropriate protections to achieve them, the measures they adopt are subject to proportionality review by the ECJ. Therefore, their autonomy in regulating gambling services is not absolute.

In the *Gambelli*<sup>325</sup> case, the ECJ cleared the indeterminacies in its previous gambling decisions by adopting a proactive approach. The court conducted an assessment as to whether the restrictive measures are suitable to address the stated policy goals in a consistent and systematic manner or, instead, they are merely protecting domestic operators and tax revenues. This decision gives detailed instructions to the national courts and leaves very little discretion to them. By doing so, the ECJ set outer limits for the EU member states' margin of discretion (Hörnle, 2010, Littler, 2007:35-6). Accordingly, the national courts should decide whether the restrictions on freedom to provide services and freedom of establishment satisfy the following conditions:<sup>326</sup> this ruling (Littler, 2007).

- i. justified by imperative requirements in the general interest,
- ii. suitable for achieving the objective which they pursue,
- iii. not going beyond what is necessary in order to attain it, and
- iv. applied without distinction

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<sup>321</sup> The monopoly structure of the Finnish legislation that grants the operation of slot machines in Finland exclusively to a public body were at issue, whereby slot machines provided by an English company was made available to the public by a Finnish Company. The court concluded that the restriction constituted a barrier to the freedom to provide services, although it was applied on a non-discriminatory basis.

<sup>322</sup> Paragraphs 35-9 of *Lääri*

<sup>323</sup> Case C-67/98 *Zenatti* [1999] ECR I-7289, The measure at issue was the Italian legislation reserving the right to take bets on sporting events for certain bodies. The legislation applied without distinction and therefore could be saved by the express derogations or justified via overriding reasons in the public interest.

<sup>324</sup> Paragraph 34 of *Zennatti*

<sup>325</sup> In *Gambelli* the Italian agencies were transmitting the bets to the English bookmaker Stanley International Betting Limited via the Internet. However, the consumers were not linked to the service provider directly via the Internet, a link that characterizes the peculiarity of the cross-border provision of Internet gambling services. Nevertheless the Italian government confirmed that if the individuals were connecting directly with the betting service provider located in another EU member state directly via the Internet, those individuals would be committing an offence. Please see paragraph 56 of *Gambelli*.

<sup>326</sup> Paragraph 65 of *Gambelli*.

The *Lindman*<sup>327</sup> case was a protective measure that intended to deter Finnish residents from participating in lotteries outside of Finland via higher taxation tactics.<sup>328</sup> It is not a continuation of the series of ECJ rulings on gambling cases due the discriminating nature of the measure at issue and its target as the consumer.<sup>329</sup> By finding that the restrictions were a breach of Article 56, the ECJ showed that the regulatory autonomy on taxation regimes, another area left to the EU member states' competence in the overall application of internal market rules, as related to gambling services was also not absolute. Later in 2008 a very similar decision was issued in *Commission v Spain*.<sup>330</sup>

The *Lindman* decision was followed by the *Anomar*<sup>331</sup> decision, in which ECJ returned to its more passive stance, compared to *Gambelli*. This decision related to a dispute among Portuguese parties and therefore it was not a cross-border issue.<sup>332</sup> The relevance of EU Laws to an internal dispute reveals the integration level of the EU.

### *Aftermath*

As the Internet gambling related cases piled up at the national courts, the restrictions at issue were referred to the ECJ one after the other for preliminary rulings. Starting from 2007 the ECJ decisions started to come out. Until the ECJ's position became clear on the limits of

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<sup>327</sup> Case C-42/02, *Lindman* [2003] ECR I-13519

<sup>328</sup> This case concerned a lottery winner from Finland, Ms. Lindman, who had purchased a lottery ticket in Sweden while on holiday and won a prize. The Finnish authorities subjected this earning to various taxes, although Finnish lottery winnings of Finland residents were not subject to the same. The consequence of this legislation was that the Finnish residents would prefer to participate in lotteries organized in Finland rather than those organized in other EU member states. The restrictive measures were discriminatory in nature and were evaluated within the scope of Article 56 TFEU, whereupon the ECJ did not find the justifications well founded.

<sup>329</sup> "The file transmitted to the Court by the referring court discloses no statistical or other evidence which enables any conclusion as to the gravity of the risks connected to playing games of chance, a fortiori, the existence of a particular causal relationship between such risks and participation by nationals of the member state concerned in lotteries organized in other member states." Please see paragraph 26 of *Lindman*

<sup>330</sup> Case C-153/08 *Commission v Spain* 2009 ECR I-10341 In *Commission v Spain*; upon complaint from the European Commission, ECJ issues a decision regarding Spain's legislation governing taxation of income from winnings of lotteries, games of chance and betting organised outside of Spain. It was argued to be incompatible with EU laws because the exemption of these winnings from taxation when gained from certain authorized Spanish operators while not granting the same favourable tax treatment for winnings gained from the operators of the other EU member states is a discriminatory practice. The ECJ agreed that the restriction at issue was discriminatory and could only be justified by express derogations and if it is in conformity with the proportionality principle.

<sup>331</sup> Case C-6/01 *Anomar*, [2003] ECR I-08621

<sup>332</sup> The National Association of the Operation of Amusement Machines of Portugal (*Anomar*) joined by eight other Portuguese companies involved in marketing and operation of gaming machines challenged Portuguese Laws regarding operation of gaming machines. Those laws categorize gaming machines and apply varying levels of protection to each category, as by limiting them to licensed casinos. The ECJ ruled that the subject legislation did constitute a restriction on freedom to provide services, even if it applied without distinction. However the court found that the restrictions adopted by the Portuguese legislation also fall within the margin of discretion that EU member states enjoy.

margin of discretion in regulating gambling services provided within their borders; each new decision was anticipated by the Internet gambling industry and others with a more liberal mindset with hopes of judicial support for liberalization of gambling services within the EU. On the other side, especially national authorities and then current license holders expected ECJ decisions to support right to preserve national regimes. Therefore, the decisions analysed below were mostly viewed as to whether the ECJ will take a step towards liberalization or not. However, for this dissertation, these decisions and the following review section are significant in relation to the powers of the ECJ decisions in limiting national autonomy in regulating an area related to public morals, the review standards applied in the process and their significance in shaping overall EU policy on the subject and individual national regimes.

### 5.5.2. ECJ Case Law regarding National Gambling Monopolies

Monopoly systems have been commonly employed among member states as a protectionist measure to control provision of gambling services. Austria, Portugal, the Netherlands, France and Germany have been among these states whose legislative systems have come under review of the ECJ. The ECJ having acknowledged the member states right to choose the level of protections it deems appropriate to achieve its legitimate objectives, did not dismiss monopolies. This became evident initially in *Läärä* and *Anomar* decisions. Following those the decisions in *Bwin*<sup>333</sup> (Portugal), *Betfair*<sup>334</sup> and *Ladbrokes*<sup>335</sup> (the Netherlands), *Carmen*<sup>336</sup>, *Stoß*<sup>337</sup> and *Winner Wetten*<sup>338</sup> (Germany), *Engelmann*<sup>339</sup> and *Dickinger*<sup>340</sup> (Austria) *Zeturf*<sup>341</sup> (France), *Garkalns SIA v Rīgas dome*<sup>342</sup> (Latvia) were issued. In each case the ECJ assessed the legitimacy of the goals intended to achieve via these restrictions and conducted a proportionality test to see if the legislation at issue contributes to these goals and whether it is applied in a consistent and systematic manner. If the proportionality test was satisfied the court found that the restrictions imposed by the subject legislation were justified, given the absence of harmonization in this area, it was for each state to determine the restriction in

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<sup>333</sup> Case C-42/07 *Liga Portuguesa de Futebol Profissional & Bwin International (Santa Casa)* [2009] ECR I-7633.

<sup>334</sup> C-203/08 *Sporting Exchange & Others (Betfair)* [2010] ECR I-4695

<sup>335</sup> Case C-258/08 *Ladbrokes Betting & Gaming and Ladbrokes International* [2010] ECR I-04757

<sup>336</sup> Case C-46/08 *Carmen Media Group* [2010] ECR I-8149

<sup>337</sup> Case C-316/07 etc. *Stoß & Others* [2010] ECR I-8069

<sup>338</sup> Case C-409/06 *Winner Wetten* [2010] ECR I-8015

<sup>339</sup> Case C-64/08 *Engelmann* [2010] ECR I-8219 Judgment of 09/09/2010

<sup>340</sup> Case C-347/09 *Dickinger and Ömer* [2011] ECR I-0000 Judgment of 15/09/2011

<sup>341</sup> Case C-212/08 *Zeturf* [2011] ECR I-0000 Judgment of 30/06/2011

<sup>342</sup> Judgment of the Court (Fourth Chamber) of 19 July 2012. *SIA Garkalns v Rīgas dome*.

accordance with its values and to ensure their protection. In that respect in the *Bwin*<sup>343</sup>, *Ladbrokes*<sup>344</sup>, *Betfair*<sup>345</sup>, *Zeturf*<sup>346</sup> and *Rīgas dome*<sup>347</sup> cases existence of monopolies in Portugal, the Netherlands, France and Latvia respectively were justified under Article 56 TFEU.

Despite ECJ's approval both France and the Netherlands have decided to change monopoly structures and proposed amendments. In fact, during the *Zeturf* case, the French authorities were already in process of amending their legislations to cover gambling services provided on the Internet and correct inconsistencies with EU Laws which had been pointed out by European Commission via infringement actions.<sup>348</sup> Indeed, on 12 May 2010 the French Gambling Act<sup>349</sup> came into force.

Dutch authorities have also decided it was in their best interest to liberalize online gambling and offered draft legislation in 2012.<sup>350</sup> In this example, the policy changes were not imposed from the supranational level. Rather factors including the other EU member states policy changes, political and economic factors have resulted in a liberalization decision. This sort of developments shows that judicial enforcement is not the only way that leads to change. Allowing space for contestation among competing approaches has the potential to produce change as well.

The ECJ reached a different conclusion in the Austrian and German cases and found the then-current state monopolies incompatible with EU law and found that they were not contributing to limiting betting activities in a consistent and systematic manner. In *Carmen*<sup>351</sup>, *Winner*

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<sup>343</sup> The dispute concerned a sponsorship agreement whereby Bwin, an Austrian Internet gambling company with registered offices in Gibraltar, became the official sponsor of the First Football division in Portugal and was allowed to promote and offer its activities on a large scale, despite Santa Casa's exclusive rights to organize all games of chance, via traditional and electronic means in Portugal. Bwin did not intend to offer its services in Portugal via intermediaries or establish itself otherwise. Therefore, the rule regarding freedom of establishment was not applied to the case. Paragraph 46 *Bwin*

<sup>344</sup> De Lotto, the Dutch non-profit monopoly that held the exclusive license to organize sports-related prize competitions, the lottery and the numbers games, had requested that Ladbrokes cease offering its services via the Internet to Dutch residents.

<sup>345</sup> A bookmaker licensed in the UK and in Malta applied to the Dutch government to offer sports-related prize competitions and pari-mutuel betting on horse races, and inquired as to whether it needed a Dutch license.

<sup>346</sup> Despite the existence of a monopoly, Zeturf offered, inter alia, betting on French horse races on its website depending upon its licence issued by the Maltese gambling regulation authority.

<sup>347</sup> Judgment of the Court (Fourth Chamber) of 19 July 2012. *SIA Garkalns v Rīgas dome*.

<sup>348</sup> Please refer to Section 5.4.

<sup>349</sup> Law n° 2010-476

<sup>350</sup> Please see Dutch governments's statement "Online games of chance will be allowed in future" on 22 May 2013 at <http://www.government.nl/news/2013/05/22/online-games-of-chance-will-be-allowed-in-future.html>

<sup>351</sup> Carmen Media, a media company which holds a license in Gibraltar to market bets on sports competitions abroad, applied for a declaration of approval or alternatively an authorization or at least tolerance from Land

*Wetten*<sup>352</sup> and *Stoß*<sup>353</sup> the ECJ's ruling confirmed that the EU member states may adopt a monopoly system whether or not it would be difficult to maintain its effectiveness due to the volume of Internet based transactions and to prohibit cross border gambling activities. However, the national courts may legitimately consider that the monopoly is not suitable for guaranteeing achievement of the objectives<sup>354</sup> for which it was established if the advertising of the games operated by the monopoly and the other games operated by the authorized private operators exceed the level necessary to channel the potential players to legitimate venues, the authorized private operators exploit the types of games they offer, and if those games are potentially more addictive and their expansion is tolerated by authorities.<sup>355</sup>

In the aftermath, the German authorities have decided to change their gambling legislations in order to overcome inconsistencies with EU Laws, as pointed out in the three decisions issued in 2010. However, the initial draft submitted in the summer of 2011 as well as the amended version in December 2011 did not satisfy the European Commission. Despite criticisms on several issues Germany enacted the said legislation<sup>356</sup>, with the exception of one state Schleswig-Holstein. In disagreement with the draft legislations Schleswig-Holstein adopted its own gambling legislation in 1 January 2012 and liberalized its online gambling market. Later they also decided to join other German states. This change is expected to take effect in 7 January 2013.<sup>357</sup> The German legislations are still in a transformation period and they are considered inconsistent (Günter Schmid et al., 2013:158). Germany's experience in enacting a new uniform legislation that will satisfy both the EU Commission and its 16 states has been comparably more challenging than Italy and the Netherlands probably due to its federal

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Schleswig-Holstein to perform its activities there as well. Land Schleswig-Holstein, which had a monopoly system for said activities, rejected this application whereupon Carmen Media brought action under TFEU Article 56.

<sup>352</sup> Winner *Wetten* had been stopped from carrying on its business by the Mayor of Bergheim based on legislation under which exclusive rights had been given to a monopoly.

<sup>353</sup> *Stoß* refers to five different cases which have been joined for a preliminary ruling. The first three cases concerned Mr. *Stoß*, *Avalon* and Mr. *Happel*. These three persons have established their businesses in Land Hessen, Germany as representatives of betting companies established and licensed in other EU member states. They have been prohibited from carrying on their business without proper authorization from the competent German authorities. The other two cases concerned three other persons who have established a betting on sports business in Stuttgart, Germany. Their activities were also prohibited based on legislation that authorized a monopoly on organizing sports betting much like Land Hessen's.

<sup>354</sup> In this case the objectives were preventing incitement to squander money on gambling and combating addiction to the latter by reducing opportunities for gambling and limiting activities in that area in a consistent and systematic manner. Please see paragraph 107 of *Stoß & Others*

<sup>355</sup> Operative part of *Stoß & Others*

<sup>356</sup> Staatsvertrag zum Glücksspielwesen in Deutschland [Glücksspielländerungsstaatsvertrag] [Amended State Treaty on Gambling] [GlüÄndStV] of 15 December 2011, in force as of 1 July 2012.

<sup>357</sup> Please see Communication from the Commission SG(2012) D/52346, Notification Number 2012/519/D

structure in which the right to regulate gambling had been left to individual states. This process sets a good example of the mechanics of the multi-level governance system of the EU.<sup>358</sup>

The Austrian Gambling Legislations had been challenged in three different cases: *Engelmann, Dickinger & Hit and Hit Larix*.<sup>359</sup> Previously infringement actions had been issued by the European Commission, as well.<sup>360</sup> After *Engelmann* and *Dickinger and Ömer* Austrian authorities amended their laws to ensure compliance with EU Laws. However, a further review in the *Hit and Hit Larix*<sup>361</sup> case revealed further inconsistencies. Austria, therefore, is expected to conduct further amendments in their laws. These developments show that, in case of Austria the gambling policies and legislations are being amended piece by piece in response to the ECJ decisions.

In the *Engelmann* case, the legislation at issue measures at issue related to the licensing procedures for casinos<sup>362</sup>. The application of the Austrian Gaming Act had the effect of creating a state monopoly on lotteries and casinos. The ECJ has ruled that the requirement for companies to have a seat in Austria in order to operate there and the absence of a transparent tendering procedure amounted to “indirect discrimination on the grounds of nationality” and a breach of equal treatment. Therefore both provisions were found to be in breach of freedom of establishment and freedom to provide services obligations<sup>363</sup>. In the *Dickinger & Ömer* case<sup>364</sup> the ECJ found that not Article 49, but Article 56 alone applied to this case.<sup>365</sup> Upon its

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<sup>358</sup> Please see Section 5.3.

<sup>359</sup> Case C-176/11 *Hit and Hit Larix* [2012] ECR I-0000 Judgment of 12/07/2012

<sup>360</sup> Please see Section 5.4.

<sup>361</sup> ECJ’s *Hit and Hit Larix* decision concerns Austria’s ban on advertising foreign casinos and how far such a restriction is compatible with fundamental freedoms guaranteed by EU law. The decision states that a member state may apply restrictions to advertisements of foreign casinos on the ground that the casino’s home state does not provide equivalent protection for gamblers. However, identical regulation cannot be required and the restriction must be directly related to protecting consumers.

<sup>362</sup> Austrian Gaming Act (Glücksspielgesetz) allowed only public limited companies established in Austria which do not have branches abroad to apply for licence applications to operate casinos.

<sup>363</sup> The *Dickinger and Ömer* case displays a good example that displays complications of the single European market. Mr. Dickinger and Mr. Ömer, founders of a multinational Internet games group, the parent company of which is in Germany, were also directors of one of the subsidiaries of this group established in Austria. The subsidiary in Austria had been in the business of automatic data processing and information technology services and holds a license from Austria to offer bets on sports competitions. The Austrian company owned a subsidiary in Malta which has three other subsidiaries also established in Malta. The website that had been operated by two of these Maltese subsidiaries, which hold a license from there, while the Austrian Company provided a server, website maintenance and software development services. The customers were always in direct relationship with the subsidiaries.

<sup>364</sup> This case related to criminal proceedings against Mr. Dickinger and Mr. Ömer for offering games of chance for the benefit of the company they direct without Austrian gambling license whereas the only licensed online gambling company was effectively a monopoly.



review, the ECJ noted that criminal legislations should not limit the fundamental freedoms guaranteed by EU Law, thus placing a limitation on the powers of the EU member states in criminal matters. Within that framework the ECJ ruled that if the national legislation that imposes a monopoly for operation of Internet casino gambling is not compatible with EU Laws, criminal penalties cannot be imposed for infringement of that legislation. These cases were also informative on the limits of national autonomy in employing monopolies in gambling services.

### **5.5.3. EFTA Case Law regarding National Gambling Monopolies**

The significance of the two cases is their detailed guidance on the requirements of the proportionality test provided by the EFTA Court, offering examples of inconsistencies possible between the stated aims and actual practice of the EEA contracting party. The clarity it provided shed light on some of the uncertainties that arose from the previous ECJ rulings. Although two separate free trade areas, in 1994 the three members of EFTA have signed the EEA Agreement with EU to become a part of the Single Market. In Article 105 of this agreement homogenous interpretation of its provisions had been stipulated. Therefore, EFTA follows ECJ's case law to achieve this homogeneity and ECJ has made references to EFTA Court decisions as well. That is why EFTA cases are referred to in this Chapter.

In *Ladbroke's*<sup>366</sup> an English betting and gaming company, Ladbroke's Ltd., challenged the rejection of its 3 license applications to provide both online and offline gambling services, including lotteries, horserace betting and various other games in Norway.<sup>367</sup> Ladbroke's argued that Norwegian authorities had breached their EEA commitments, which let them participate in EU's single market, by rejecting Ladbroke's applications for permission to provide its services, offline and online. In *EFTA Surveillance Authority v. Norway*<sup>368</sup>, the EFTA Court evaluated the proposed legislation by which the Norwegian government planned

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<sup>365</sup> Because the fact that a "provider of games of chance marketed over the Internet makes use of material means of communication supplied by another undertaking established in the host EU member state is not in itself capable of showing that the provider has, in that EU member state, a fixed establishment similar to an agency, which would have the consequence that the Treaty provisions on freedom of establishment would apply". Paragraph 34 of *Dickinger & Ömer*.

<sup>366</sup> Case E-3/06 *Ladbroke's Ltd v The Government of Norway* [2007] 3CMLR 12

<sup>367</sup> Paragraphs 6-8, *Ladbroke's Ltd v The Government of Norway*. "(1) the Gaming Act, which establishes a monopoly for the state-owned company Norsk Tipping for the operation of games such as Lotto and sports betting; (2) the Totalisator Act, which is the legal basis for the exclusive right of operation of horserace betting granted to Norsk Rikstoto, a state-controlled foundation; and (3) the Lottery Act which provides that minor money games such as Bingo and scratch cards may only be operated by non-profit organisations and associations with a humanitarian or socially beneficial purpose." EFTA Court Press Release 03/2007, Luxembourg

<sup>368</sup> Case E-1/06 *EFTA Surveillance Authority v. Norway* [2007] 2CMLR 27

to amend existing gambling-related legislation to give the state-owned company Norsk Tipping the exclusive right to operate gaming machines and to exclude private operators from this activity. The then existing legislation allowed private operators to operate gaming machines on behalf of charitable organisations.<sup>369</sup> The Court held that the exclusion of private operators restricts the rules of the EEA Agreement on freedom of establishment and freedom to provide services.

#### **5.5.4. Case Law regarding other trade restrictions**

The ECJ had the chance to rule on licensing regimes required in Italian Gambling Legislations in four different cases. As examined above, it had already found in the *Gambelli* and *Zennatti* decisions that some aspects of Italian gambling legislations were in breach of their EU obligations, despite the wide margin of discretion granted to EU member states in regulating this sector. These two decisions were followed by the *Commission v. Italy*<sup>370</sup> and the *Placanica*<sup>371</sup> decisions. In the *Placanica* case not only was the subject legislation the same but the facts<sup>372</sup> were very similar to those of the *Gambelli* case in which the ECJ had already decided that the subject restrictions<sup>373</sup> constituted an obstacle to freedom of establishment and freedom to provide services. This decision set narrower limits for national discretion and therefore raised hopes of the proponents of a liberalized European Internet gambling industry who had been looking for a sign of recovery from the disappointment caused by the Services Directive.<sup>374</sup> The restrictions in the *Commission v. Italy* related to the renewal procedures of existing licences for horserace betting operators and whether general transparency principle and the obligation to ensure a sufficient degree of advertising was infringed upon by the Italian authorities. Eventually, the Italian gambling laws were amended to comply with EU Laws<sup>375</sup>. However, they were also brought before the ECJ in *Costa and*

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<sup>369</sup> Paragraph 9 of *EFTA Surveillance Authority v. Norway*

<sup>370</sup> Case C-260/04 *Commission v. Italy* [2007] ECR I-07083

<sup>371</sup> Joined cases C-338/04, C-359/04, C-360/04, Criminal Proceedings against Massimiliano Placanica and Others [2007] ECR I-01891

<sup>372</sup> A UK licensed bookmaking company, Stanley International Betting Ltd., operated in Italy via more than 200 agent offices, provided direct access to its servers hosted in the UK at their premises via a data transmission link. Stanley International Betting Ltd. could not apply for a license because the subject Italian legislations excluded publicly held companies from tender procedures for reasons of transparency.

<sup>373</sup> These were, very generally, limitation on number of licenses in order to channel betting into a legitimate framework and to prevent crime, exclusion of publicly held companies from the tender procedures, criminal penalties issued against unauthorized betting agents of the English operator.

<sup>374</sup> Please see Section 5.3.4.

<sup>375</sup> The decree regarding the amendments was called Decreto Bersani (Decree No. 223 of 4 July 2006).

*Cifone* case<sup>376</sup> and these decisions were the major driving force behind the legislative changes.<sup>377</sup> Their application of the new legislation which also imposed restrictions on freedom to provide services, resulted in favouring previous license holders at the expense of new applicants, were not clear on reasons for withdrawal of licenses<sup>378</sup> and that withdrawal of licenses were not proportionate<sup>379</sup> for the stated objective which was preventing criminal activities.<sup>380</sup> Therefore, the Italian legislations need further amendments to be in compliance with EU Laws.

In the *Sjöberg and Gerdin*<sup>381</sup> case the ECJ ruled on the Swedish legislation that prohibits the promotion of Internet gambling services, the companies that are established in other EU member states and operate for profit.<sup>382</sup> The ECJ found the said restriction in consistent with EU laws.<sup>383</sup> However, the ECJ also ruled that legislation that enforces stricter penalties for promotion of gambling activities authorized in the other member states when compared to promotion of gambling activities operated without a license within the national borders will not be compliant with TFEU Article 56.<sup>384</sup> This ruling revealed another aspect of gambling legislation that is promotion of gambling services, which needs to be re-considered under EU Laws. Sweden has not proposed the expected amendments to the European Commission as of the date of this dissertation.

#### 5.5.5. Analysis of the ECJ & EFTA Review Processes

The ECJ has produced twenty two rulings on gambling related disputes since 1994. Through these judgments, which became the primary source for mapping the legal framework for cross-border provision of Internet gambling services within the EU, the limits on the EU member states' autonomy in regulating gambling services within their borders became clearer. The ECJ's role had been a challenging one, especially because gambling has always been a controversial topic, the trade of which had been governed by monopoly structures in

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<sup>376</sup> Please see Press Release Online gambling: Barriers removed in Italy, European Commission IP/10/504 on 5 May 2010.

<sup>377</sup> Joined Cases C-72/10 & C-77/10 *Costa and Cifone* [2012] ECR I-0000 Judgment of 16/02/2012

<sup>378</sup> Paragraph 90 *Costa and Cifone*

<sup>379</sup> Paragraph 81 *Costa and Cifone*

<sup>380</sup> Operative part of the Judgment, *Costa and Cifone*

<sup>381</sup> Joined Cases C-447 & C-448/08 *Sjöberg & Gerdin* [2010] ECR I-6921

<sup>382</sup> *Sjöberg and Gerdin* were editors in chief and publishers for *Expressen* and *Aftonbladet* newspapers, respectively. Both allowed, in the newspapers they managed, the promotion of Internet gambling companies established in other EU member states and were consequently ordered to pay criminal penalties for breach of relevant Swedish legislation.

<sup>383</sup> Paragraph 46 of *Sjöberg & Gerdin*

<sup>384</sup> Paragraph 57 of *Sjöberg & Gerdin*

the majority of the EU member states. The rulings were a display of the difficult task of balancing the treaty objectives that represent the interests of the EU and the single market against the legitimate interests of both the EU member states at the receiving end of the service, the EU member states in which the provider is established, and the recipients of the service.

Through an analysis of the decisions discussed above, it can be concluded that the ECJ recognized the EU member states' large margin of discretion in determining their own gambling policies, the objectives targeted by them and the level of protection necessary to achieve them.<sup>385</sup> However, the rulings also held that should these practices amount to restrictions of one or more of the fundamental freedoms of the TFEU,<sup>386</sup> the restrictions should be based on legitimate reasons and should satisfy the proportionality assessment. Therefore, in the absence of EU-wide harmonization in the area, the EU member states are free to adopt gambling regimes ranging from prohibition to liberal licensing systems; however, these measures will still be subject to judicial review under the relevant provisions of the founding treaties. Given that all the EU member states, whose legislation became the subject of the disputes, had placed some sort of restriction on the provision of the gambling services; the defining section of the rulings became the ECJ's guidance to the national courts as to how the EU laws should apply to a variety of gambling policies and regimes.

In accordance with TFEU Article 52(1)<sup>387</sup>, EU member states may take directly discriminatory measures<sup>388</sup> only if they can be justified on grounds of public policy, public security or public health. This list is exhaustive and is referred to collectively as express derogations. The court has recognised additional bases for justification of measures that are indistinctly applicable or indirectly discriminatory. In the gambling-related case law some examples of these overriding reasons in the public interest are fighting crime and fraud linked

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<sup>385</sup> This margin of discretion had been justified with the moral, religious or cultural factors and the morally and financially harmful consequences for the individuals and for society associated with betting and gaming. Thus, the national authorities can determine what is required to ensure consumer protection and protection of society in accordance with their own scale of values. Please see paragraph 76 of *Stoß*, paragraph 57 of *Bwin* and paragraph 47 of the *Placanica* decision and the case law cited.

<sup>386</sup> Within that context, ECJ ruled that national legislations which restrict or prohibit provision of gambling services from operators established in other Member States is a restriction on freedom to provide services and, where relevant freedom of establishment; therefore an infringement of Article 56-57 and Article 49 of the TFEU, respectively.

<sup>387</sup> Also Article 62 which references it.

<sup>388</sup> Discrimination both on grounds of nationality and on grounds of place of establishment are included. However, the ECJ's case law on restrictions that are discriminatory on grounds of establishment had been found to be inconsistent, as indirectly discrimination on the grounds of nationality and public interest requirements had also been accepted. For a thorough evaluation and examples please see page 375 in Barnard (2010).

to gambling and addiction to gambling, avoiding the incitement to squander money which may have damaging individual and social consequences and so on. As a matter of fact, by the time that gambling-related disputes started to appear, in its assessment of measures held to be not discriminatory on grounds of nationality, the ECJ had already started to base its assessments on whether these measures are otherwise likely to prohibit or otherwise impede freedom to provide services.<sup>389</sup>

In gambling-related disputes, the ECJ has not required the EU member state to take into account the provisions of the EU member state in which the service provider is established. The reason provided for this flexibility was that, out of respect for the differences between the policy objectives and the levels of protection, the EU member states at the receiving end of the gambling services cannot be regarded as sufficiently assured that their consumers will be protected against the risks and fraud and crime.<sup>390</sup> What's more, given the margin of discretion granted to the EU member states and the lack of harmonization at EU level, the EU laws in their current state impose no duty of mutual recognition in the gambling area.<sup>391</sup> Therefore, the proportionality assessment is conducted independently of this requirement, solely with reference to the objectives pursued by the competent authorities of the EU member state concerned and the level of protection which it seeks to ensure.

Although proportionality is strictly required, the assessment is conducted with slight variations. In accordance with gambling-related case law, once it is established that the subject restrictions serve legitimate policy objectives, the first test is suitability, by which the national courts will have to assess whether the restrictions are also suitable to achieve the objective claimed as a ground for justification. This test is assessed in relation to each legitimate objective, and it may also be necessary to distinguish between various games.<sup>392</sup> The second step is an assessment of the necessity of the measures, by which the national courts will have to determine whether the measures go beyond what is necessary to achieve the aims in question and whether there are less restrictive measures that can reach the same objective. Given that most gambling related disputes concern monopolies, the case law regarding the proportionality assessment of monopolies has become quite comprehensive.

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<sup>389</sup> I.e., instead of having to decide whether they are indirectly discriminatory or indistinctly applicable.

<sup>390</sup> In some rulings it is acknowledged that there will be difficulties for the EU member state at the receiving end in assessing the professional qualities and integrity of the service providers/operators. Please see paragraph 96 of *Dickinger & Ömer* which refers to paragraph 69 of *Bwin*.

<sup>391</sup> Paragraph 112 of *Stoß & Others*

<sup>392</sup> *Ladbroke's v Norway*

In a nutshell, in accordance with the proportionality assessment, the EU member states which have adopted monopolies must show that their aim is to ensure a particularly high level of protection and that they can pursue their objectives effectively and deal with the risks connected with the gambling sector only by granting exclusive rights to a single entity which is subject to strict control by public authorities.<sup>393</sup>

In doing so, the EU member states may legitimately claim that a monopoly structure enables its public authorities to implement their policies more effectively by allowing them additional means to supervise and influence the monopoly holder and the supply of games than they would have had should the same services have been provided by private operators in a competitive market, even if the latter were subjected to a system of authorization and a regime of supervision and penalties.<sup>394</sup> The claim is relevant to the necessity of the restrictive measures.

In terms of suitability, the national legislation is expected to reflect genuine concern in reaching the stated objective in a consistent and systematic manner.<sup>395</sup> What's more, it should also ensure that the monopoly holder will be able pursue these objectives in a consistent and systematic manner by means of a supply that is quantitatively measured and qualitatively planned.<sup>396</sup> Within this framework the commercial policies of the monopoly holders become relevant for the proportionality assessments. For example, despite the fact that monopoly structures aim to reduce opportunities for gambling and prevent incitement to squander money on gambling, they can also pursue expansionist commercial policies, which may include offer of an extensive range of games, advertising and utilization of the new distribution techniques.<sup>397</sup>

The expansionist policies of the monopoly holders have been found acceptable under a few conditions. The ECJ has ruled that controlled expansionist policies can be consistent with the objectives of preventing the use of gambling activities for criminal or fraudulent purposes and of preventing incitement to squander money on gambling and combating addiction to gambling by channelling consumers away from unauthorized suppliers into a regulated supply of gambling. This ruling is based on the assumption that the monopolies are free from

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<sup>393</sup> The second part is a test of necessity. Please see paragraph 40-42 of *Läära and Others*, paragraph 66-67 of *Bwin*, paragraph 81-83 of *Stoß* and paragraph 41 and 47 of *Dickinger & Ömer*

<sup>394</sup> Please see paragraph 82 of *Stoß & Others*

<sup>395</sup> Paragraph 88-98 of *Stoß & Others*

<sup>396</sup> Paragraphs 57 of *Dickinger & Ömer*, 37 of *Ladbroke* and 83 of *Stoß*

<sup>397</sup> Paragraphs 37 of *Ladbroke*, 69 of *Dickinger & Ömer* and 67 of *Zeturf*

criminal elements and that they will not try to expand the existing market but only try to capture or retain it.<sup>398</sup> In reflection of this assumption, the advertising campaigns of the monopolies must be limited to what is necessary to thus channel consumers. Under no condition are the public funds gained via gambling proceeds acceptable as the main goal of a restrictive policy, let alone an expansionist policy of a monopoly, although they are acceptable as an incidental beneficial consequence.<sup>399</sup>

It is not only the activities of the monopolies that are the subject of the restrictive legislation but also their legal form.<sup>400</sup> Therefore these requirements also become a subject of the proportionality assessment and should thus be suitable for ensuring that the objectives pursued by setting up a monopoly system will be achieved and that any measures taken will not go beyond what is necessary for that purpose. For example, a requirement for minimum share capital may be justified under the claim that it is useful to ensure that the provider is capable of meeting its obligations, the claims of winning gamblers, unless there are no other less trade-restrictive measures.<sup>401</sup>

The ECJ has classified the requirement that the registered office of the holder of the monopoly be within the EU member state in which it will provide its services as a discriminatory measure that can be justified only by express derogations. The national courts will have to assess whether there is a genuine and sufficiently serious threat to any fundamental interest of the society and whether there are less restrictive ways of ensuring the level of monitoring attained by the public authorities over a provider established in their national territory on others established in other EU member states.<sup>402</sup>

The ECJ has not been as accommodating to the preservation of the monopoly structures in the alcohol trade. In a case concerning importation of spirits, wine and strong beer to Sweden from other EU member states<sup>403</sup>, the established monopoly structure required all such sales to go through the national state monopoly provider. Therefore individual purchases through the Internet or other distance sale methods were prohibited. The justifications provided for the necessity of the monopoly were very similar to those provided in the gambling cases, the protection of health and life of humans by combating alcohol abuse and protection of minors.

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<sup>398</sup> Paragraphs 101 and 102 of *Stoß and Other*, 63, 69 of *Dickinger & Ömer*, and 30 of *Ladbrokes*.

<sup>399</sup> Paragraphs 57-60 of *Schindler*, 32-37 of *Läärä*, 35-36 of *Zenatti* and 61-62 of *Gambelli*.

<sup>400</sup> I.e., the amount of their share capital and the location of their registered offices.

<sup>401</sup> Paragraphs 77 of *Dickinger & Ömer*

<sup>402</sup> Paragraphs 84 of *Dickinger & Ömer*

<sup>403</sup> Case C-170/4 *Klas Rosengren and others v Risåklagaren* [2007] ECR I-04071 Judgement of 5 June 2007.

In this case the ECJ did not find the imposed trade restrictions justified, even though the grounds listed were not much different from those in the gambling cases (Hörnle and Zammit, 2010: 162-3). Therefore, the ECJ has granted the EU member states greater autonomy in determining their gambling policies as compared to policies regarding alcohol consumption.

### **5.6. Non-judicial Processes in relation to national gambling regulations**

In the path leading to harmonization of member states laws or ensuring coherence among national legislations not only administrative and judicial processes but also non-judicial processes are effective. Among them there are examples of preparation of reports, discussions, negotiations and cooperation among member states. As the examples below will show they take place alongside the judicial process. The motivations behind these efforts can be political, economic as well as sociological.

For a long time, the EP and the European Council adopted a passive stance and their contributions consisted of opinions that defended the preservation of existing systems. In this period no solutions were proposed for the immediate problems. Therefore, the ECJ had no choice but to assume the central role in interpreting the application of the relevant EU legislation, and its early case-law set the fundamental basis for the ECJ's subsequent rulings. It was only after 2004, along with further Internet gambling issues keeping the ECJ busy, other EU institutions have also become more decisive and acted on the acknowledgement that the changed market structure necessitated a more proactive performance. Eventually, all three primary institutions of the EU have assessed the cross-border provision of gambling services from their own perspectives, although there was an initial reluctance to take the initiative.

#### *SICL Report*

Prompted by complaints and changes in the gambling market, the European Commission re-entered the gambling services debate as well. As an initial step, in 2004, it requested new comprehensive research regarding the legal and economic aspects of gambling in Europe from the Swiss Institute of Comparative Law (SICL)<sup>404</sup>. One of the most significant findings of this study was that the coexisting national gambling laws differ significantly from one another, even though the public policy objectives that they intend to protect are mostly similar. It also confirmed that the gambling legislation of many EU member states often

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<sup>404</sup> Swiss Institute of Comparative Law 2006, Study of Gambling Services in the Internal Market of EU.



leads to barriers to the freedom to provide services and the freedom of establishment and is therefore not compatible with EU Laws.

### *Schaldemose Report*

The official view of the European Parliament on the gambling services trade also came to light a few months later, in February 2009, when it approved the Schaldemose Report.<sup>405</sup> The report presented Internet gambling as a source of increased opportunities for fraud, corruption and other criminal behaviour and greater potential for gambling addiction and defended national legislation as a more appropriate form of governance in the Internet gambling area as opposed to a purely internal market approach. The report failed to recognize the legitimate, well functioning and regulated Internet gambling markets that have been active in most EU member states which had not posed payment-related increased risks to consumers. What's more, the findings of an independent study<sup>406</sup> requested by the Committee on Internal Market and Consumer Protection were mostly ignored which found that there is no evidence as to: (1) the amount of money laundered through Internet gambling, (2) any increase in problem gambling due to the availability of Internet gambling, (3) a relationship between problem gambling and organizational structure and ownership of gambling, (4) and little hard evidence that EU consumers are defrauded on EU-licensed websites. The unfortunate shortcomings of the report overshadowed its calls for extensive research and cooperation at the member state and Union levels and for creation of a European Code of Conduct.

### *Report on the Integrity of Online Gambling*

In the fall of 2008, the Council of the EU had also decided to participate actively in efforts to produce solutions to the problems that had arisen relevant to this fragmented industry and set up a Working Party for Gambling and Betting. The purpose of the Working Party was to bring the EU member states together to share their experiences and to work on mutual solutions to their problems. The Council of the EU adopted their progress report on 10

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<sup>405</sup> 'Report On the Integrity of Online Gambling' of 17 February 2009, European Parliament, Document no: A6-0064/2009. This report widely became known as "Schaldemose Report" because it was drafted by Christel Schadelmose, a socialist group member of the Parliament from Denmark, on behalf of the Committee on Internal Market and Consumer Protection at the end of 2008.

<sup>406</sup> It was conducted by Europe Economics, an independent consulting company based in the UK. 'Online Gambling: Focusing on Integrity and A Code of Conduct for Gambling' YOUNG, R. & TODD, J. 2008. Document No: IP/A/IMCO/ST/2008-13.

December 2010<sup>407</sup> which will likely prove to be quite useful if a European Code of Conduct for the gambling industry comes to light. In their report, the Working Party has introduced the definition of illegal gambling: “gambling in which operators do not comply with the national law of the country where services are offered, provided those national laws are in compliance with TEU principles”.<sup>408</sup> This definition emphasizes national values limited by the EU commitments. The report did not call for harmonisation but acknowledged the necessity of increased cooperation between regulatory public authorities in order to address the difficulties presented by remote gambling across the EU. Therefore, the EU member states were called to share information, ease administrative burdens, and communicate on how to protect consumers and vulnerable people and to identify and share best practices.

This step showed that the EU member states have become aware that the established cooperation mechanisms of the EU could benefit them in tackling cross-border gambling related problems.

### *The Green Paper*

These developments had an impact on gambling policy at the EU level which became apparent with the European Commission's Green Paper on Gambling in March 2011,<sup>409</sup> under which an extensive public consultation on on-line gambling was launched. A wide range of stakeholders subsequently provided information on relevant public policy challenges and possible Internal Market issues resulting from the consumption of Internet gambling services, upon which five different workshops consisting of specialists in the area, were formed to complement the consultation process. The European Commission pointed out that there were no predetermined steps to follow the consultation.<sup>410</sup>

The Green Paper is a further step in the EU member states' exploration of the possible advantages of the established structures of the EU in addressing their common problems related to Internet gambling. As of the publication time of Green Paper 23 member states and all three EFTA states had given notice of draft Acts and regulations regarding gambling. This

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<sup>407</sup> ‘Conclusions on the framework for gambling and betting in the EU member states’ adopted by the Council of the European Union at 3057th Competitiveness (Internal Market, Industry, Research and Space) Council meeting. Brussels, 10 December 2010. Council document 16884/10.

<sup>408</sup> Please see VI. Conclusion, first paragraph the same document.

<sup>409</sup> European Commission, ‘Green Paper on Online Gambling in the Internal Market’ SEC (2011) 321, 24 March 2011.

<sup>410</sup> European Commission, ‘Public Consultation on on-line gambling in the Single Market’, 20 October 2011, MEMO/11/186.

reformation process, in fact, had started in January 2005.<sup>411</sup> The EU member states had little or no choice but to reconsider their long-standing traditions of national control in the gambling services, the legislation of which had already been developed with noteworthy differences, and to adapt to the multi-level changes that had undermined their existing systems.

### *Creutzmann Report*

The European Parliament adopted Creutzmann Report, a second report on online gambling after Schaldemose report, on 15 November 2011, which had been referred to with its rapporteur's name as well.<sup>412</sup> This report reflected the changing attitudes towards online gambling as its finding and recommendations were mostly in contradiction to the previous report. Creutzmann Report, very generally, calls for greater co-ordination among EU member states and a European Directive on consumer protection and betting fraud and requests common standards on licensing.<sup>413</sup> Even if it does not call for harmonization of regulations, due to unique nature of gambling, it also warns against the danger of lack of co-ordination between member states.<sup>414</sup>

### *Communication "Towards a comprehensive European framework on online gambling"*

In October 2012, the European Commission proposed an EU-wide action plan and a set of initiatives, based on the public consultation that was launched by the Green Paper. The action plan and the initiatives were stipulated in the Communication "Towards a comprehensive European framework on online gambling" (Communication).<sup>415</sup> Therein, the EU Commission acknowledged that the type of challenges posed by the cross-border provision of online gambling services and their implications will be best tackled by cooperation among the EU

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<sup>411</sup> 'Commission Staff Working Document, Accompanying document to the Green Paper on Online Gambling in the Internal Market', European Commission, SWD (2012) 345, 23 October 2012, Brussels.

<sup>412</sup> 'On online gambling in the Internal Market', Jürgen Creutzmann, European Parliament Register of documents, 14 October 2011, (2011/2084(INI))

<sup>413</sup> For further details please see suggestions sections of the Creutzmann Report.

<sup>414</sup> Some of the examples are: distortion of the competitive environment, allowing grey and black market gambling to thrive on the internet, and failure to protect potentially vulnerable consumers. Please see pp. 14 and 19 of the Creutzmann Report.

<sup>415</sup> "Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the regions towards a comprehensive European framework on online gambling" European Commission, Strasbourg, COM(2012) 596 final.

member states and that it is no longer possible for them to reach effective results individually. The action plan targets five goals in order of priority, which are:<sup>416</sup>

- i. compliance of national regulatory frameworks with EU law,
- ii. enhancing administrative cooperation and efficient enforcement,
- iii. protecting consumers and citizens, minors and vulnerable groups,
- iv. preventing fraud and money laundering,
- v. safeguarding the integrity of sports and preventing match-fixing.

It is further stated in the communication that international cooperation will be promoted in order to reach of the targeted goals of the action plan.<sup>417</sup>

### **5.7.Conclusion: United in Diversity**

This chapter has focused on the Internet gambling services trade as an internal market matter. The aforementioned judicial rulings and legislative and administrative actions have all reflected an acknowledgment of the diversity of national regimes in the absence of harmonization in this area. Especially based on moral, religious and cultural considerations, a large margin of discretion has been granted to the EU member states<sup>418</sup> notwithstanding the fact that their national regulations will still be subject to review by the ECJ should they restrict market access.<sup>419</sup> In light of the information provided in this chapter, the gambling services trade experience of the EU seems to serve as a fitting example of its motto “united in diversity” and therefore constitutes no threat to the greater EU project, which aims for higher integration in economic and social areas.

It has even been suggested that the value-based approach to gambling-related cases may suggest a more holistic approach in the interpretation of primary treaty obligations regarding the internal market by giving consideration to values other than trade, which may in turn indicate a “move from market building into a market deepening project conditional on mutually agreed solutions, even if it is of a cooperative nature (Gerard, 2012)”. This thought also embraces the idea that uniformity of regulations is not a necessity for the success and/or coherence of an economic and political union such as the EU.

The argument of this chapter is supported by an overview of gambling-services-related developments in the EU occurring over 20 years. Particular attention was given to the ECJ’s rulings, which assumed the central role in mapping the limits of EU member states’

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<sup>416</sup> Page 4 of the Communication.

<sup>417</sup> Please see Introduction and paragraphs 2.2.2., 2.4., 2.5., and 2.5.4. of the Communication.

<sup>418</sup> Therefore a majoritarian approach had been avoided.

<sup>419</sup> This is conducted in accordance with TFEU Article 56.

regulatory powers. It had been argued that the ECJ's view of the internal market, was defined by pluralism rather than uniformity even long before the cross-border gambling provision emerged as an issue (Littler, 2007, Bernard, 1996).<sup>420</sup>

The EP and the Council of the EU, though reluctant to take action in the beginning, also acknowledged and even supported the continuance of the plurality of national legal gambling regimes as long as legislation remained in compliance with relevant EU obligations. The European Commission, though more proactive compared to the other two administrative organs, allowed itself time to evaluate the market and developments after its initial intention to propose harmonization of the industry, before the Internet took centre stage as a means of facilitating cross-border trade. Their cumulative response was embodied in the Green Paper and the ensuing Communication that acknowledged the diversity of regulations in the gambling services area. However, both documents encouraged and facilitated administrative cooperation and coordination among the EU member states in order to address the challenges posed by the co-existence of their national regulatory systems, mostly for the purpose of protection of consumers, prevention of fraud and preservation of the integrity of sports and prevention of match fixing. This paper could be interpreted as a reminder to the EU member states that even in areas left to state competence; the member states are expected to comply with EU laws and that there are non-judicial methods available to them to cooperate in order to address common concerns, as members of an economic-political union. This message also signifies that the EU's overall integration process embraces national diversity, and with it diversity of cultural and regulatory traditions (Gerard, 2012) while expecting the member states to address issues resulting from this diversity that concern the citizens of the EU as a whole.

Lastly, the EU member states, despite being assured of their sovereign competence to regulate, whether prompted by the ECJ rulings, the infringement proceedings or the need to adapt to the multi-level changes that have undermined their existing systems, have begun to reconsider their long-standing traditions and methods of national control in the regulation of gambling services. This reformation process was followed by the action plan proposed by the European Commission that explicitly rules out EU-wide legislation but sets out a plan that will require high level of cooperation from the member states.

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<sup>420</sup> A further long standing view of the ECJ that has had an influence on its ruling related to gambling-related services is that; in matters that are separable from production, the proper law is that of the country where the goods and services are marketed (Bernard, 1996).

Therefore, in the EU, the initial tension and adversity among the EU member states that arose from the cross border provision of Internet gambling services, embodied in the disputes brought before the ECJ, has been transformed into a reformation process on a state by state basis and an EU wide action plan that will be coordinated by the European Commission. The effects of the reformation process and the action plan on the pluralistic structure of regimes will depend on the results of operational and strategic cooperation between the national models that have emerged and between the actors, including popular, judicial, and institutional ones, who have played significant roles in their development (De Burca, 2009).

The EU institutions have acknowledged that gambling is indeed a special item of trade that is best regulated at state level on the basis of their social policy objectives. On the other hand, the ECJ and the European Commission, each within their capacity, made sure that these regulations comply with the EU laws. The European Commission further initiated an action plan that requires participation and cooperation of the member states, in order to address problems that concerns EU citizens as a whole and would be best tackled by adopting common principles at EU level and possibly at international level. This process indicates that in the EU context the plurality of national regulations in public morals areas had been acknowledged and not deemed a threat to the realization of the market integration goals or the desired EU legal order, *per se*. This in turn had the effect of giving space to member states to deliberate their priorities. Mostly because there are a very strong incentives and adequate mechanisms in place to address shared concerns, accommodating these divergences and the processes of pluralism have not undermined primary treaty objectives or the constitutionalisation process.

## **6. Protection of Public Morals and International Services Trade**

### **6.1. Introduction**

This chapter elaborates further on the concepts of trade liberalization and public morals with reference to some current thoughts on the particularity of public morals areas and state autonomy in regulating them. In that regard, the impact of the digital age will also be given specific consideration. By placing the analyses of the previous chapters in that sort of theoretical context, this chapter shows that the divergence of public morals among nations constitutes a significant limitation on ambitious theories regarding a future world order that emphasizes the universalizability of values. However, this finding does not imply that these divergences cannot be accommodated within multinational trade systems that aim to achieve a deeper integration level than that offered by simple multilateral trade arrangements. Furthermore, as the data show, the states are connected and interact in various forms and at different levels under a range of motivations which are not always imposed by the treaties that regulate their relationships or by judicial rulings. Therefore, strains on one level of a relationship do not necessarily indicate total fragmentation as an inevitable outcome.

It must be emphasized that the method of analysis in this chapter is not a comparative one and does not consist of a comparison of the WTO experience with that of the EU. Even if occasional conclusions will be drawn based on comparison, this concluding chapter is instead an exercise in examining similar developments in two major international systems by taking their differences into consideration and benefiting from the experience of each to contribute to the concluding concept.

### **6.2. Services Trade Liberalization and Protection of Public Morals**

In the international trade area, not only the GATS and the TFEU, but most contemporary trade liberalization treaties<sup>421</sup> acknowledge each member state's right to retain national autonomy in regulating areas concerning public morals.<sup>422</sup> As Krajewski observed, the relationship between services trade liberalization and national regulation will likely be the most important challenge for the multilateral services trade regime (2003: xviii-xix).

In this context, the biggest challenges have been for the judicial bodies of the trade organizations which have to assess correctly whether the public morals justification is

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<sup>421</sup> The first consideration of a moral exception to international trade rules emerged in 1922 at the Genoa Conference (Charnovitz, 1998).

<sup>422</sup> Please see Appendix 1 in Marwell (2006).

invoked legitimately or used merely as a disguise to preserve the protectionist regimes and the profits generated by that industry. The difficulty arises due to indeterminacy of the public morals concept and also from the fact that a state may be pursuing public morals goals and economic objectives at the same time under the protection of the same regulatory regime. Therefore, even if the judicial organ correctly assesses whether a service or good is indeed a matter of public morals, it is further expected to balance the interests of the states in regulating public morals areas against the rights of the other member states to conduct free trade, using the review standards available to it. The challenge is exacerbated by the fact that “public morals” constitute quite a broad concept, the proper context and limits of which are extremely difficult to define. In addition, the challenging features of the public morals defence, especially the ambiguity of its scope, makes it a useful and logical defence strategy for states looking to justify the trade restrictions they have placed for a variety of reasons, whether public morals are among these.

In the following sections, a review of the judicial interpretations of the scope of public morals will be conducted. This discussion will be followed by an analysis of the review processes applied to the trade restrictions that had been claimed as justified under the public morals exception.<sup>423</sup>

### **6.2.1. Defining the scope of public morals**

In the gambling-related case law analysed in this dissertation, the ECJ did not define the concept of public morals. In fact, starting from its first gambling-related decision, the ECJ acknowledged that gambling activities have moral, religious and cultural value, explaining why the EU member states tend to restrict or prohibit gambling or avoid its becoming a source of private profit<sup>424</sup> but did not elaborate on the definition of moral values. Although this first case, *Schinldler*<sup>425</sup>, was related to the importation of lottery products only, the ECJ

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<sup>423</sup> Throughout the thesis, the analysis is based on the existing services-related case law. Therefore, there is no mention of disputes in which public morals of the exporting state have been or will be invoked as a justification for restriction by an importing state. One example of such a circumstance would be restrictions placed on importation of products and/or services from states in which slavery is allowed or where production is conducted in an unethical manner, as pointed out by Charnovitz (1998) in his comprehensive study on moral exceptions to trade policy which examined the problem from this perspective as well. For further insight on this topic consult Wu, (2008), Wright (2010) and Gonzales (2006).

<sup>424</sup> Please refer to Section 1.1. Public Morals and National Sovereignty.

<sup>425</sup> Please see Section 5.5.1.



did not restrict its commentary to lotteries, but generalized it to cover all gambling activities, providing no further reasoning and moving on to review the restrictive measures.<sup>426</sup>

On the other hand, the WTO Panel followed a step-by-step approach in defining it<sup>427</sup> so as to conclude whether gambling qualifies to be considered as such.<sup>428</sup> The WTO Panel found that public morals are “standards of right and wrong conduct maintained by or on behalf of a community or nation”.<sup>429</sup> They also added that although public order is a distinct concept some overlap may exist given that similar and sometimes identical values are protected by both concepts. For example, in paragraph 6.467 the Panel concludes that “‘public order’ refers to the preservation of the fundamental interests of a society, as reflected in public policy and law. These fundamental interests can relate, inter alia, to standards of law, security and morality”.

Thereafter, the WTO Panel moved on to decide whether gambling is indeed a matter of public morals for the US. For this purpose, the Panel first referred to the existence of other WTO members who have explicitly defined it as such.<sup>430</sup> It then referred to the negotiation documents of a draft convention at the Economic Committee of the League of Nations, where the President of the conference, in response to a question by Egypt, confirmed that prohibition of the importation of foreign lottery tickets would be covered by the moral exception.<sup>431</sup>

Based on such references it seems that the WTO looks for general agreement among its members or at the international level rather than accepting each WTO member state’s absolute discretion in defining its own moral values. As a continuance of this attitude, in the second dispute regarding public morals, *China - Publications and Audiovisual Products*, the Panel referred to definitions in an international declaration, the UNESCO Universal Declaration on Cultural Diversity, which had been signed by both parties of the dispute and most WTO member states.<sup>432</sup> It did so despite the fact that the US did not contest whether the

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<sup>426</sup> Please see Section 5.5.1.

<sup>427</sup> Please see paragraph 6.465 *US-Gambling* Panel report.

<sup>428</sup> Please see paragraphs 6.471 to 6.474 *US-Gambling* Panel report.

<sup>429</sup> Please see paragraph 7.7597.759 of the Panel report in *China-Publications and Audiovisual Products*.

<sup>430</sup> In paragraph 6.471 of *US-Gambling*, the WTO Panel referred to Israel and Philippines. Israel maintains an import prohibition on tickets or publicity items for lottery or gambling and Philippines limits foreign ownership of gambling operations for reasons of public morals.

<sup>431</sup> Paragraph 6.472 *US-Gambling* Panel Report

<sup>432</sup> In its Article 8, the Declaration states that cultural goods are “vectors of identity, values and meaning” and that they “must not be treated as mere commodities or consumer goods”. In China’s view, it is clear, therefore that, depending on their content, cultural goods can have a major impact on public morals.

issue at hand was a matter of public morals for China.<sup>433</sup> Once again, the Panel referred to evidence that reaches far beyond the borders of the state that invoked the public morals exception, seeking universal agreement.

### **6.2.2. An evaluation of the differences in approach**

The difference in the approaches of the two judiciaries indicates three alternative outcomes. First, the relatively comprehensive review standards available to the ECJ are more effective in determining possible exploitation of the public morals exception for justification of measures implemented for the sake of protectionism. Therefore, the ECJ may rely on these review standards to find if a measure is intended solely for protectionism or genuinely intended to protect public morals (as well) rather than also employing review standards to assess whether the matter at issue is in fact a public morals matter. The review mechanisms available to the WTO courts, on the other hand, are much far limited. Therefore, in order to avoid such exploitation, reviews at this initial stage also become essential.

Second, because the EU is a much more integrated and harmonized area, there is consensus among EU member states concerning what public morals are and which goods or services should be considered within that classification. Such is not a far reaching claim, given that in the Charter of Fundamental Rights of the European Union the common spiritual and moral heritage of the EU member states is accepted as a common denominator facilitating their course toward a more integrated structure based on common values.

On the other hand, the WTO area has a more pluralistic structure; its members do not form a community based on shared heritage or values but joined together with the primary intention of enhancing their trade potential and wealth by becoming members of the most comprehensive trade liberalization organization. Therefore, the WTO Courts rightfully act on the premise that there is neither an assumption of a shared definition of public morals nor a related classification of goods and services as such among WTO members.

A third alternative outcome is that the EU structure embraces the plurality of values that remain diverse<sup>434</sup> and therefore, the ECJ leaves it solely to the discretion of EU member states' to define what qualifies as an item of public morals. If this alternative is embraced, the

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<sup>433</sup> Paragraphs 7/7517.751 *China- Publications and Audiovisual Products* Panel Report

<sup>434</sup> The diversity of values has a much narrower scope than that of WTO member state which are, often, of very different backgrounds.

WTO's intention becomes an effort to define a common set of definitions and values among its members as a step toward establishing a trade community with stronger ties.

Public morals is such a fragile concept that behind the EU's presumed common values and the WTO's efforts to establish some, the courts of both organizations have also emphasized that they acknowledge that each member may have different moral values from any other. Leaving aside the ECJ's unquestioning manner, the definitions provided by the WTO Courts, even if significant, provide little guidance as to the assessment criteria of whether a good or a service is in fact a concern for public morals. Therefore, a wide margin of discretion is left to the WTO member states; hence the indeterminacy and risk of exploitation of the concept remains a concern.<sup>435</sup>

In order to address this conundrum, some academics have endeavoured to infer some indication of the Panel's and the Appellate Body's standards from the *US-Gambling* and *China-Publications and Audiovisual Products* rulings as to the limits of what can be considered matters of public morals. One such scholar is Wright who has commented that a majoritarian view of the population of the WTO member state in question is required to determine whether a given service or goods item is related to public morals (2010). She based her argument on the use of two phrases: "A measure that is sought to be justified under Article XIV(a) must be aimed at protecting the interests of the people within a community or a nation as a whole" and "the content of these concepts for members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values"<sup>436</sup>. She observed that the use of the word "prevailing" in the second phrase especially could not be interpreted otherwise than as a requirement for submission of evidence of a majoritarian view within that state.<sup>437</sup> Another such scholar is Marwell, who commented on the Panel's references to show other states or international organizations also acknowledge that the goods or services subject to dispute are of moral concern. According to his approach states will be expected to submit evidence of wider acknowledgement of moral aspect of the issue at hand when invoking a public morals defence (Marwell, 2006).

However, there are not enough examples in case law to reach a conclusion as to how a WTO Court will approach a public morals claim of one of its member states if that value is

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<sup>435</sup> Please see Sections 4.8. and 6.2.3.

<sup>436</sup> Paragraph 6.461 *US-Gambling* Panel report

<sup>437</sup> Diebold had made a similar comment previously (2008).

particular to that state.<sup>438</sup> The inferences mentioned above are merely indications of the possible directions that the WTO courts can take in defining what constitutes a public moral. At present, the only certainty is that, although the WTO refers to evidence beyond the borders of the invoking state, it also recognizes that the submission of such evidence is not a prerequisite and that each member could have different moral values. This mixed attitude of the WTO is an admission of the necessity of a pluralistic view of public morals for the present, accompanied by efforts to contribute towards the progress of their universalization.

### **6.2.3. A review of the procedural recommendations**

The continued indeterminacy of the scope of public morals has prompted several recommendations from academia as to how the WTO courts should determine a certain good or service as one relating to public morals, ranging from purely unilateralist approaches to universalist ones. This section will introduce a general overview of these recommendations taking the four possible methods introduced by Marwell as a reference point: originalism, universalism, moral majority or multiplicity and unilateralism (2006).

In originalism, the intentions of the original drafters of GATT, who used the term for the first time, would be the primary reference for determining whether a good or a service qualifies as one relating to public morals. Marwell quickly dismissed this approach as being inconsistent with the Appellate Body's present jurisprudence, which has adopted an evolutionary approach in the interpretation of exceptions and found it unsuited to the increased diversity of the WTO member states (2006). Wu agreed with Marwell on these points (2008). Gonzales had fewer reservations concerning this method but argued that while it may decrease the risk of protectionist attempts it would not be helpful in guiding future disagreements (2006).

The universalist approach would require the states to show evidence of similar practice from other WTO members or from other international agreements. Marwell dismissed this approach as well, rightfully pointing out that universally shared values would be those least likely to be cause for conflict and to be in need of protection. Also, this requirement might render the public morals exception useless by limiting it unreasonably (2006). Gonzales supported this method, claiming that trade objectives can be protected from protectionism of the member states only if the scope of public morals is limited to traditional moral issues,

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<sup>438</sup> I.e., if it is not a moral concern in any other member state and/or if there is no evidence as to an acknowledgement of that value as a moral value in other international platforms.

such as slavery, drugs and alcohol. In his view, other exceptions should be defined to address other values that can be potentially classified as public morals issues (2006).

Wu proposed a combination of originalism and universalism as the best alternative<sup>439</sup>, by which the court would first consider whether the subject value could be considered as falling under the public morals are by the original drafters of the GATT. If this determination is in the negative, the court would then consider if the category of service or goods is internationally recognized as a moral issue. He argues that this combined method allows dynamic interpretation and does not restrict the public morals concept by requiring universal agreement, but only requires near-universal agreement on the wider category of the subject goods or services(2008).<sup>440</sup>

In the third method, moral majority, there is a requirement to show widespread consensus among the states most likely to be affected. Marwell merged this method with universalism<sup>441</sup> and dismissed it, for its potential to serve the advancement of geopolitical and protectionist agendas and therefore undermine the moral values of any state whose public morals are different from those of the others (2006).<sup>442</sup>

As a result, Marwell argued that a unilateralist interpretation is the most appropriate one in defining the public morals concept. According to him a state should be able to define public morals unilaterally, but should produce evidence supporting its claim. This approach, he emphasized, would be consistent with the historical meaning of general exceptions clauses. Requirement for submission of substantial evidence, such as historical practice, opinion polls and statements of accredited religious leaders, would avoid trivial claims and allow the WTO courts to test the credibility and content of the documented evidence and seek information from other sources. Under this model, potential overuse would be avoided via the standards applied to the implemented measures which are the requirement to adopt the least restrictive measure to protect the measure at stake and non-discrimination (2006). Marwell's approach values state autonomy in protecting values that may be specific to that state above possible minor abuses of the public morals exceptions that may escape the review processes in the next stage. Wu has called this method "expansive unilateralism with evidentiary constraints".

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<sup>439</sup> In his article, Wu also proposed different methodologies for outward directed measures which are not considered in this thesis.

<sup>440</sup> Wu gave the example of restrictions placed on foods and beverages. In a categorical agreement there does not have to be agreement as to whether pork products or alcohol is a public morals issue; there just has to be near-universal agreement that foods and beverages could relate to public morals.

<sup>441</sup> Marwell used the term *transnationalism* instead of *universalism*.

<sup>442</sup> Marwell also added that the wording of the provision refers to public morals of any 'state' not of 'states'.

For Wu, this method would not be effective in avoiding exploitation of this provision and would eventually risk “destabilizing the reciprocal bargains that underlie the international economic system and reduce net welfare by suppressing otherwise beneficial economic change” (2008). This risk has also been pointed out by Marwell himself. Charnovitz on the other hand has recognized this as a viable method.<sup>443</sup> He has proposed referring to international human rights law in interpretation of the public morals exception and other exceptions defined in the same provision. Doing so, Charnovitz argued, would “recognize the symmetry in our pursuit of both global commerce and global values”(1998: 27).

Marwell’s method fails, however, to propose a solution to the protection of the diverse moral values among states, the ones that are most likely to become the subject of disputes. As Diebold has suggested that “an international interpretation that fails to protect the subjective values of individual members would render the morals and order exceptions largely ineffective, turning it into a toothless tiger (2008: 54)”.

Diebold recognized the importance of the protection of diversity of public morals but rejected pure unilateralism as a possible solution due to increased risks of abusive use of the exception. He argued that the states should provide evidence proving that the subject goods or services are indeed of concern to their public morals or public policies. He suggested that evidence of similar practice by other states should be suitable to strengthen the claims of the state, although such evidence could not be a requirement or qualify as the only source of validation. Diebold also mentioned national legislation and international agreements, religious texts and scholarly research as viable evidence (2008). His solution is parallel to Marwell’s and could also be classified under Wu’s definition of “expansive unilateralism with evidentiary constraints”. Both these solutions are not very different from the method applied by the WTO courts. In her extensive study, Wright also defended a unilateralist approach by pointing out the significance of each state’s right to enforce its unique moral code as a key component of its police power. Similarly, she also argued that the state should provide any proof of its “citizens’ affirmative articulation of their moral beliefs” (2010: 119).

The “expansive unilateralism with evidentiary constraints”, especially the form supported by Diebold, seems to be the most viable method to adopt as a judicial decision-making paradigm for a public morals issue. There are globally shared common values among the states, but

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<sup>443</sup> Charnovitz has, however, pointed out that if the importing state is invoking restrictions based on the public morals of the exporting state, this method would not be suitable. It would be too open ended and would let states with market power to impose their own values.

there are also significant differences that arise from a range of factors including but not limited to religion, tradition, history, governance system and economic wealth. No state should be left in a position to disregard its moral values as a result of its membership in a trade union. However, the objectives of the trade organizations are also too significant to be undermined by exploitation of public morals provisions and should be protected. A requirement to produce evidence as to the validity of the state's claim that the service or good in question is really of concern to the public morals of that state, followed by an effective review process would decrease the risks posed to the international trade system. The type of evidence should not be limited, given that the circumstances of each state differ. Nevertheless, the evidence's credibility should be examined by the court in the face of contradictory evidence. In this way, the acknowledgement of particularity of public morals and resultant pluralism in that area will not undermine the greater trade system.

The limitations of each proposed method also argue for the importance of the review process of the restrictions as the next important step in balancing trade objectives and public morals claims. Therefore, the methods proposed in this section should always be considered in conjunction with the judicial review of the restrictive measures, which will be examined in the next section.

#### **6.2.4. The measures at issue and the judicial review processes**

The evidence presented thus far establishes that in both the EU and the WTO jurisdictions the respective courts have recognized that gambling services are linked to public morals, the control of which is best achieved at the state level.<sup>444</sup> The courts of both jurisdictions also recognize each member state's right to determine the level of protection it deems appropriate. This right, however, is not absolute. The restrictive measures implemented will still have to be in conformity with certain standards designed to protect the primary treaty objectives of the relevant trade liberalization agreements. These review standards, also useful in avoiding the exploitation of the public morals exception, have been introduced in the previous two chapters along with relevant case law.

In this section the judicial review standards of the WTO courts and the ECJ are examined in terms of their scope to assess the degree of these organizations' involvement in their member states' national public policies on matters of public morals. In line with the overall level of

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<sup>444</sup> This conclusion is parallel to the evaluation of the gambling concept in the first chapter, which concludes that gambling activities are very much linked to moral values, although the states' role in governing moral areas has been changing in recent years.

integration each organization achieved, it will become apparent that the EU member states' laws and their application are subject to a much higher level of scrutiny. Although both jurisdictions have reached a relevant determination in principle, their members may decide upon the level of protection and measures they deem appropriate in matters of public morals, given that these matters remain a matter of national competence. The difference in the level of scrutiny is, at least partly, due to the fact that in the EU context this review is mostly conducted by national courts that have a much better understanding of the national circumstances as compared to international courts, which limit their analysis to the wording of laws and legislative documents.

In the WTO the two assessment criteria are necessity and non-discrimination. Thus, the public morals exception can be successfully invoked if given measure is necessary to achieve a given public policy objective and its application does not lead to an arbitrary or unjustifiable discrimination or a disguised trade restriction. Such is the two-tier test applied by the Panel in *US-Gambling* approved by the Appellate Body, and later used in *China-Publication and Audiovisual Products*. The respondent has to prove the necessity requirement, first by showing that the subject measures are designed to address the relevant public interest at issue in a determination which may be called a suitability test. The wordings of the provisions are sufficient to this end. The respondent then has to prove that the measures are indispensable or of absolute necessity. In this regard a weighing and balancing test is applied by also considering the alternative measure offered by the complainant,<sup>445</sup> where the importance of the objective intended to be achieved by the subject measure and the contribution that the said measure makes to the realization of the objective should outweigh the trade restrictiveness of the measures, if available (Delimatsis, 2010). Then the measure should be compared to the alternative measures proposed by the complainant. In order to be considered an alternative measure, it should effectively achieve the level of protection sought by the regulating state while attaining a lower level of trade-restrictiveness and be reasonably available to the respondent.<sup>446</sup> Thereafter, the DSB considers the manner in which the subject measure is applied. In other words, the DSB assesses whether the measure constitutes an arbitrary or unjustifiable discrimination between countries where like conditions prevail or constitutes instead a disguised restriction of international trade. The Panel in *US-Gambling*

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<sup>445</sup> The three factor balancing necessity test for was initially designed in *Korea-Beef* and *E.C.-Asbestos* cases (Wu, 2008).

<sup>446</sup> Please see paragraphs 237-254 of the Appellate Body report in *China-Publications and Audiovisual product*.



emphasized the importance of the good faith principle in its review.<sup>447</sup> The non-discrimination requirement is relatively easier to test as compared to the necessity requirement (Delimatsis, 2010).

As discussed in detail in Chapter IV, the ECJ also applies certain reviews to the EU member state's restrictive measures, even if these are considered to concern a public morals matter or are related to any other exceptions specified by EU laws. The review standards of the EU, however, have moved beyond discrimination to a restriction-based approach (Eeckhout, 2001).<sup>448</sup> In such an approach the proportionality test retains its critical importance as the initial review standard applied by the ECJ. The test consists of two tiers, by which the legitimacy and the suitability of the measure(s) are reviewed.<sup>449</sup> Accordingly, the measure has to contribute to the policy aim and be applied in a consistent and systematic manner. The second tier of the test is the necessity assessment, which requires that the restrictive measure should not impose restrictions beyond what is necessary in order to achieve the stated aims. The restriction-based approach provides the trade liberalization clauses of the EU treaties with more potential to affect national regulatory policies, even if this potential is somewhat limited to public interest requirements (Eeckhout, 2001).

The differences among the review standards of the EU and the WTO are inevitable given the substantial differences between the EU and the WTO, from their integration level and organizational structure to the diversity level of their members. Firstly, more detailed accounts of the member state measures and relevant data are brought to the review of the ECJ as compared to that of the WTO. This difference is mostly due to the extensive use of the preliminary reference method by which most of the gambling-related cases have been brought before the ECJ. Under this method, the national courts decide on the facts of the case and the ECJ grants a ruling on the interpretation of the application of certain EU laws. The national courts, which have extensive knowledge of the national circumstances, act as the

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<sup>447</sup> Please see paragraph 6.575 of the Panel report in *US-Gambling* which refers to Art. 31 of the Vienna Convention. Article 31 sets general rules of interpretation of international treaties. According to the first paragraph "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

<sup>448</sup> Accordingly, if the restrictions subject to dispute are found to be directly discriminatory, they can be saved by express derogations provided that they satisfy the proportionality test. If the restrictions are not directly discriminatory, the question is then whether they are liable to prevent or impede access into their market or impose an obstacle or restriction to free movement. If the answer is positive, the measure will be tested as to whether it can be saved by express derogations or justified by public interest requirements.

<sup>449</sup> The subject measure should serve one of the legitimate policy objectives and it must be suitable to achieve that objective.

first guarantors of the EU law. Therefore, most ECJ decisions regarding public morals disputes are a joint product of the ECJ and the national courts.<sup>450</sup> Due to the prominent role of the national courts, the gambling-related rulings in the EU have been based on a more detailed analysis of the facts, and this analysis has been useful in satisfying the ECJ's review standards, which are more complex compared to those of the WTO courts.

In this vein, the disputes regarding Internet gambling and other disputes regarding public morals are a test of the tolerance level of the presumed constitutionalist goals of both the EU and the WTO. The exceptions and derogations clauses in their founding treaties were added to accommodate these sorts of differences among community members. Although some have argued that the practices of the international judiciary would be deemed unacceptable in ethical, cultural social and political social disputes (Johnston, 2005), the outcome shows that, the judiciaries acted well within the expected limits and for the overall community, and that their commitment to liberalize trade has not been undermined.

Despite the apparent differences among the two jurisdictions, there are also significant shared concerns that arise from the basic premise that both have been formed by sovereign states and that the promotion and management of trade liberalization among their members have been their primary goals.<sup>451</sup> Within this framework exceptions and derogations clauses have been a necessary feature of their founding treaties facilitating the membership and continued cooperation of the states (Cass, 2001).<sup>452</sup> Their significance arises from the fact that the autonomous areas of the states recognized by these exceptions and derogations clauses are interpreted to outline new legitimate limits and purposes of the sovereign state (Keller, 2011: 75-76, Vranes, 2009). Thus, as much as important and worthy of protection as trade liberation is, when state sovereignty is on the other side of the scale, the balancing act between the two values has become a challenging job, mostly left to the courts (Eeckhout, 2010). The review standards are the tools by which the courts perform this task. The rulings that have been examined show that the standards available to each court have been adequate in enabling both courts to perform this difficult task. Therefore, the rulings of the courts do not signal a need for a change in their review mechanisms of national restrictions, whereas the methods by

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<sup>450</sup> There are also cases directly brought by the EU Commission to the ECJ. Please refer to Section 5.4. and 5.5. for examples.

<sup>451</sup> Recently the EU has moved beyond that view of its goals, as explained previously.

<sup>452</sup> These clauses encompass areas from health and environmental standards to trade of obscene materials to gambling.

which they define the scope of public morals may definitely be improved, as concluded in the previous section.

### **6.3. Digital communication platforms and Public Morals**

The Internet and other means of digital communication platforms provided new platforms for cross-border communications and transactions which have an economic and/or cultural character. Previous technological developments, particularly in ICTs, had also been utilized by the gambling industry as well as by many other existing industries, as exemplified in Section 2.3.1 of this thesis. These sorts of forward leaps in ICTs, as in the case of the Internet, typically ease and speed up communication by removing some existing barriers and thus give rise to a “sense of the compression of global time and space, so that effects of distant events, situations and actions arise more quickly, directly and powerfully than in the past” (Cotterrell, 2008).

Walker has pointed out two distinct effects of this relative ease of reaching information and services facilitated by the new ICTs. The first is that as societies are exposed to more information about one another, they are likely to become more aware of their cultural differences and similarities. The second effect is that the powerful global actors and structures able to utilize these means more effectively will have the means to exert greater transnational influence, under a variety of motives ranging from supporting existing differences to creating and pursuing new conflicts of interest and/or imposing or facilitating new kinds of commonalities of appetites, experiences and values. Walker states that “... in the ‘compression chamber’ of globalization our similarities and differences of life experiences and life-chances alike are amplified, as our perceptions of what is valuable or otherwise both in the common standards to which we aspire and the different conceptions of good life we inherit and pursue (2012: 7)”.

Walker then comments that these amplifications both reflect and act as a reinforcing cause in the perspectives of universalism and particularism.

The discussions regarding the cross-border provision of online gambling services and each state’s claim to the right to obstruct that provision based on the particularity of its public morals constitute a good example of the dichotomy explained above.

Indeed, the use of the digital communication platforms for the provision of gambling services by unauthorized providers<sup>453</sup> has provided an easy-to-reach platform on which people meet to play against each other simultaneously and/or consume the same or similar gambling products. The universalizability of the gambling services became apparent with the reach and success of this business model, which undermined the national restrictions and the previously effective public policies related to gambling aimed at preserving public order and protecting public morals. The differences among the interests that had been protected by these state-specific policies also became known among the states, mostly as a result of their arguments in supranational courts as a part of their struggle to regain control over the gambling services provided within their borders. These similarities and differences, which had not presented much significance before even when citizens of one state had consumed gambling services, provided in another mainly by travelling there were amplified in the “compression chamber”.

On the other side of the coin, these technological advances have also enabled the states to regain control over the gambling services provided within their borders. One particularity of gambling services is that there is almost always a money trail between the service provider and the recipient of the service. In the case of Internet gambling, due to the distance between the provider and the recipient these money transactions are typically conducted through banks and other financial institutions. Therefore, the service provider and the recipient are connected via these institutions. In that vein, the UIGEA aimed to obstruct the Internet gambling service within the US borders by prohibiting transfer of funds and requiring financial institutions to implement mechanisms to that effect.<sup>454</sup> International money transfers had been already been subjected to stricter controls after the September 11 attacks on the US, to track “terrorism financing” (Roth, Greenburg and Wille, 2004). On 1 August 2010, the US and the EU had signed an “Agreement between the European Union and the United States on the transfer of financial messaging data” to cooperate to this end. In accordance with this agreement the US and the EU share financial payment messaging data to detect terrorist financing.

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<sup>453</sup> As we have seen, most service providers were not authorized by the states to which they were providing their services.

<sup>454</sup> The same issue has been discussed from a different perspective in Section 4.3.1.

In the near future, it is likely that the EU and WTO member states will explore similar cooperation methods with regard to Internet gambling services.<sup>455</sup>

The apparent similarities among the moral values attached to the gambling concept and the public policies aimed at their protection should constitute strong enough bases for cooperation at the supranational level. The EU member states are at the beginning stages of exploring this alternative among themselves and internationally.<sup>456</sup> In order for these attempts to produce results the states will have to agree on issues relevant not only to public morals aspects of gambling but also to economic and social concerns. Therefore, despite the apparent difficulties, should the states agree on some common norms and/or control mechanisms, it will be possible to consider the universalizability of the measures to protect state-specific public morals attached to gambling.

#### **6.4. State Sovereignty and Public Morals**

In the long run, the areas remaining in the sovereign, autonomous regulatory space of the states are more likely to remain diverse and help compose the foundations of arguments that emphasize the importance of adoption of a pluralistic point of view in international law in a way that emphasizes the particularity of values among societies. Within this framework, it is possible to argue that constitutionalist ideals are obliged to come to an end in areas of public morals, given that this ideology is emphasizes universality and/or universalizability of values.<sup>457</sup> However, there are less ambitious versions of supranational constitutionalism that capture not only diversity in areas of public morals but also the bigger picture wherein states have agreed on common norms of governance in a variety of areas. Therefore, acknowledgement of the particularity of public morals to each state and the fact that those morals should remain in each state's autonomous control does not necessarily minimize the supranational integration project to mere trade cooperation agreements limited to a number of agreed sectors.

As a matter of fact, the particularity and universalizability of social values are also among the fundamental bases of differing views concerning the appropriate framework for capturing the interplay between the scope of the state sovereignty and the authority of the supranational

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<sup>455</sup> Fundamental rights and privacy concerns will prevent the use of the same agreement for purposes of detecting gambling transactions. Please see Section 4 of Communication from the Commission to the European Parliament and the Council: A European terrorist finance tracking system, 2011, COM(2011) 429 final

<sup>456</sup> Please see Section 5.6.

<sup>457</sup> This type of conceptualization of the constitutionalist ideal is not definitive and is open to dispute in a number of respects, as discussed in the following sections of the chapter.

organizations and their future prospects. A significant portion of these views provide explanations based on a comparison of constitutionalist and pluralist views.

The goal of the subsequent sections is to apply these two theoretical perspectives in order to discuss the newly defined limits of state autonomy in regulating services trade as related to the protection of public morals in the digital era, with reference to Internet gambling-related disputes. The discussions presented are based on the assumption that the previous sections have established that the international trade organizations recognize that public morals are particular to each state and it is a sovereign state's inherent right to preserve its autonomy in regulating areas related to its public morals. In order to provide clarity to the discussion, a critical step will be to define the conceptual framework, given that both pluralism and supranational constitutionalism have been defined in many different ways, sometimes leaving two constitutionalist views at odds with each other, and vice versa.

### **6.5. Legal Pluralism and Public Morals**

As a further sign of pluralistic practice in the area of public morals, both the WTO and EU member states have moved to resolve the issues that arise due to inconsistencies in their rules via negotiations and mutual persuasion, a method which is believed by legal pluralists to be the best method for problem-solving.<sup>458</sup> In order to address common threats and concerns, the European Commission has also encouraged this process by conducting an extensive public consultation and proposing an action plan based on its results.<sup>459</sup>

Especially in the EU; the acknowledgment of autonomous decision-making in the issue of cross border provision of Internet gambling services has led to non-judiciary cooperation efforts; mainly to address potential threats to their citizens. Therefore, it has been observed that the higher level of integration of the EU member states served as a platform for discussion of common principles regarding issues surrounding Internet gambling even if it is not going to be an item of the single market in the foreseeable future.<sup>460</sup>

Therefore, at first glance it seems that legal pluralism provides an appropriate framework for describing international judicial rulings relevant to public morals by rejecting the existence of an overall community with common values, emphasizing the autonomous authoritative decision-making processes and advocating communication and conflict resolution through

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<sup>458</sup> Krisch, as well, emphasized mutual persuasion among the autonomous units in the EU (2006).

<sup>459</sup> Please see Section 5.6., Green Paper

<sup>460</sup> Please see Section 5.6.

agonistic political processes, ad-hoc negotiation and pragmatic adjustment (De Burca, 2009). However, the usefulness of explaining this one area, independently from the much more comprehensive international legal system that it is a part of, is questionable. The review processes of the judiciaries and their resulting rulings have shown that state autonomy in regulating even public morals areas is not absolute and the review mechanisms of the supranational judiciary seems well formulated to tolerate diversity in certain areas.

### **6.6. Supranational Constitutionalism and Constitutionalisation**

In this vein, the disputes regarding Internet gambling and other disputes regarding public morals are a test of the tolerance level of the presumed constitutionalist goals of both the EU and the WTO. The exceptions clauses in their founding treaties were added to accommodate these sorts of differences among community members. Although some have argued that the practices of the international judiciary would be deemed unacceptable in ethical, cultural social and political social disputes (Johnston, 2005), the outcome shows that, the judiciaries acted well within the expected limits and for the overall community, and that their commitment to liberalize trade has not been undermined.

Despite the diversity of its members, the limitation of the scope of review of the judiciary to trade issues and its stabilized integration level, the WTO is still considered a constitutional organization. This argument is based on its authority to limit public power (Petersmann, 2006), its ability to generate new norms (Cass, 2001), its technocratic and functional character that produces rules and solves problems (Jackson, 2009), and the interaction of these features (Trachtman, 2006, Dunoff, 2006).

As we have seen in the public morals-related disputes, the judicial bodies of the WTO and the EU have assumed a central role in interpreting the relevant principles. The hierarchical position of the WTO's judicial authority is not clear; meaning the supremacy of its decisions over regional organizations and the WTO member states is not well established. There are numerous instances of the economically powerful members' preferential compliance, often referred to as an exceptionalist attitude.<sup>461</sup> While the US is known for its exceptionalist attitude, there have also been instances in which the EU has also held its law above WTO law. Within the EU, there is no system which allows its member states to choose the scope of their commitments, and exceptionalism is not tolerated. At the core of this intolerance are the

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<sup>461</sup> A prominent example for EU is the *Kadi Case* (C-402/05P and C-415/05P, *Kadi and Al Barakaat*, Judgement of the Court of 3 September 2008. As for the US two of the examples are *Medellin v Texas* 552 U.S. 491 (2008) and *Sanchez Llamas v Oregon* 548 U.S. 331 (2006).

doctrines of supremacy and direct effect, which are a result of the integration and an insurance of the same. Both doctrines are deeply embedded in the EU system, ensuring the hierarchical position of the ECJ. Neither doctrine has been claimed by the WTO (Walker, 2001).

## **6.7. Conclusion**

The discussions and analysis in this thesis have explored the implications of recent Internet gambling cases for the scope of the autonomy of the member states of the WTO and the EU in regulating services trade in areas that concern their public morals and the limits of such regulation that arise due to regional and international trade liberalization commitments. The findings, in turn, facilitate grounds on which to ascertain which perspective best provides a descriptive and normative framework for the supranational legal system from the perspective of the application of the public morals exception and the ensuing right of national regulation.

The conclusions herein are limited to the units of analyses: the WTO and the EU. However, this thesis has not offered a comparative analysis. The shared challenges of the WTO and EU have provided examples to examine the case law arising from the two most significant supranational trade organizations, despite the major differences between the two jurisdictions.<sup>462</sup> The common foundational architecture shared by their treaties and the public international law that forms the legal and constitutional foundation of the EU have allowed the Internet gambling disputes decided under the founding treaties of the EU and WTO to be conceptualized and managed in comparable ways (Keller, 2011:81).

The second chapter explored whether the definitions inscribed in gambling legislation target the same range of activities. The legal definitions not only identify the scope of legal gambling activities but also reflect the policy aims, economic goals and moral concerns of the legislators. The commonalities among the definitions, such as their main components—chance, stake and prize—constitute basis for trade liberalization arguments that emphasize common values and common concerns. The differences even in the definition of these components as reflected in the legal definitions of gambling, mostly achieved via implementation of specific exclusions and differential treatment of certain activities, discourage supranational collaboration because they highlight divergences among states and therefore constitute justification for preservation of national control mechanisms at this stage.

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<sup>462</sup> As mentioned previously, in comparison to the WTO, the integration level of the EU member states and the institutional structure is much greater, in a way that often resembles federal states or to early stages of a state structure.



In the third chapter the *gambling* concept was introduced from a religious and a moral perspective with reference to historical accounts. In this context the interaction of legislative movements with previous economic cycles, governance systems and ideological movements was given particular emphasis. There were several significant findings in this chapter. One of them is that gambling activities have always been linked to public morals, and there is a common understanding that the moral and policy concerns surrounding gambling have been and remain particular to each society, just as public morals themselves are. Although gambling has long been regulated as a leisure sector within states, its cross border provision via digital communication platforms has brought the moral argument back to the centre of gambling-related debates. Second, the commonalities in public perceptions and regulatory approaches to gambling activities are linked to parallels in historical experiences and the liberal democratic values now prevalent in both jurisdictions. Third, the commonalities presented are sufficiently strong to facilitate grounds of communication to address common challenges.

The primary subject of analyses of the fourth chapter were the implications of the *US-Gambling* case and the judicial interpretation of the limits of WTO member states' autonomy in regulating areas that relate to their public morals. The *US-Gambling* ruling displays the difficult task of the DSB in protecting the central purposes of the treaties and effectively applying review mechanisms to conclude whether the public morals exemption is legitimately invoked or used only as a disguise to preserve protectionist regimes. Within that framework, the analysis showed that there is judicial acknowledgement of the moral diversity of nations and of the inevitable differences among their public policies as grounds for the necessity of acknowledging the right to regulate. This extensive scope of discretion in determining state-specific morals and policies has been evaluated in relation to the WTO's constitutionalisation process.

The EU chapter evaluated cross-border provision of Internet gambling services as an internal market matter was evaluated. Even though the emphasis was on the case law of the ECJ, which had to assume the central role in defining the EU approach to the matter at hand, the actions of other EU institutions, namely the European Commission, Council of Europe and the EP, were also taken into account. Here, all EU institutions acknowledged the diversity of national regimes and the large margin of discretion of the EU member states based on moral, religious and cultural considerations, notwithstanding that their national regulations will remain subject to review by the ECJ should those regulations restrict market access. On the

other hand, the EU Commission proposed an action plan to address common concerns partly as a reminder that EU member states are expected to comply with EU laws and cooperate as members of an economic-political union even in areas left to autonomous regulation. The process overall indicated that the EU embraces national diversity in certain areas, but that it first, makes sure regulations governing those areas comply with EU laws and second, implements measures to address issues resulting from this diversity that concern the citizens of the EU as a whole.

In sum, disputes brought before the ECJ and the DSB have shown that, despite possibility of commonalities in terms of moral values and public policies, each state's right to preserve its autonomy to protect small divergences is of great significance. The founding treaties and judiciaries of the WTO and EU also acknowledge the sovereign state's inherent right to preserve its autonomy in regulating areas of public morals. In that respect, both courts have utilized the review mechanisms available to them to effectively balance the claims of trade liberalization and the right to protect public morals. The analyses of the ensuing rulings have not demonstrated that either the WTO's or the EU's commitment to liberalizing services trade have been undermined via their decisions in gambling-related cases.

Finally, this chapter finds that the recognition of the particularity of the public morals of each state does not necessarily minimize the supranational integration project to merely a series of cooperation agreements. However, there are legitimate concerns regarding universalization of public morals by (enforcement of) supranational trade organizations as per the current understanding of state sovereignty. On the other hand, states are members of a much larger system of a supranational web of relations that has political, social, economic and legal implications. As a result of this interconnectedness, states influence one another, and many state actions have consequences that transcend national territorial borders (Baynes, 1997). These interactions also lead to conflict resolution via negotiation, mutual accommodation and collaboration.

As a result, this research discovers that the supranational trade organisations recognise the diversity of public morals and their member states' right to regulate these areas in accordance with their own particular needs by way of analysing the rulings and the review processes of the WTO and the rulings of EU judicial bodies and administrative works of other EU institutions. This is coherent with the almost universal acknowledgement that the regulatory authority shall be ultimately based in the diverse moral conditions of the networks of the

communities that the regulation at issue serves (Cotterrell, 2008). This acknowledgement in turn constitutes the limit of the applicability of the provisions that promote trade liberalization (Krajewski, 2003: 57). The states' autonomy, on the other hand, is limited by the type and the extent of the measures that it can implement, given that these bear consequences mostly for the trading rights of their trade partners, members of the same organizations. The overseeing organizations' authority, therefore, allows them to review these measures to avoid the exploitation of the public morals exception and to protect the primary treaty objectives. This, in turn, has the effect of protecting other member states' trading rights affected by the subject measures.

The research also shows that the supranational constitutionalist structures have been able to contain the pluralistic nature of national public morals with sufficiently strong devices. This conclusion of the research conducted in the form of case study supports the argument of constitutional pluralism is a more appropriate perspective to guide and explain the supranational legal order. This is not a conclusive presentation as there are fundamental issues that are yet to be resolved in relation to the dynamics between the particular, (represented herein only in the form of public morals of nations) and the universal. These limitations have facilitated a thorough analysis but in order to reach broader conclusions further cases that display similar tensions should be studied.

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